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Filed Oct. 10, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 67.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

LEROY F. YOUMANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

STATEMENT.

By regular conveyance from the Board of Trustees of the Columbia Canal, January 11, 1892, the plaintiff below, the plaintiff in error here, became the owner in fee, for value, of all the property, situate in and near the city of Columbia, South Carolina, known as "The Columbia Canal," and of all the lands held therewith, acquired under the Acts of the General Assembly of the said State, with reference thereto, or otherwise, from its source through its whole length to the point where it empties into the Congaree River. Portion of the realty of which plaintiff thus became owner in fee constituted the *western* embankment of the canal; upon one portion of which embankment the defendant, in February, 1893, despite the reiterated objections, protests, remonstrances and warnings of plaintiff, forcibly entered, dug, excavated and removed the earth, rock and works composing the foundation of the embankment, to the great damage of the embankment, *and to the great danger of the safety of the canal*, and erected steam engines, boilers and buildings thereon; and upon another portion of which embankment, later in May, 1893, despite the like reiterated objections, protests, remonstrances and warnings of plaintiff, defendant forcibly entered and erected thereon a boiler house, coal house, machinery and buildings. These trespasses of defendant are set out in paragraphs 12 and 13 of the complaint.

Transcript of Record, pp. 9, 10, fols. 19, 20.

By the same conveyance, the plaintiff became vested in fee for value, *inter alia*, with all the rights, franchises, privileges, immunities and property which had been conferred by the Acts of the

General Assembly of the said State upon the Board of Trustees of the Columbia Canal.

Among these rights, franchises, privileges, immunities and properties, an essential one, *the* essential one, that which induced the purchase, and without which there would have been no purchase, and no sufficient inducement to plaintiff to make the purchase, was the exclusive right, franchise and privilege conferred by the State to own and control, "to sell or lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe." (§ *21, A. A. 1887, 19 Stat. So. Ca., 1096;* § *2, A. A. 1890, 20 St. So. Ca., 968*), with immunity from any let or hindrance from the State, or any person or corporation, to interfere with its control, use and disposal of said water power.

This right, privilege, franchise, was exclusive, because the Broad and Congaree Rivers, to connect which by water was one of the purposes of the canal, being both navigable streams, and the State being the owner of the canal and of both banks thereof, and of the circumjacent lands, with all the rights of riparian proprietor, this right had been exclusive in it; and it was transferred for value and vested in plaintiff by the Acts of Assembly just cited, and the conveyance in fee from the Board of Trustees of the Columbia Canal. With immunity from any let or hindrance on the part of the State or any person or corporation, most especially any person or corporation a subsequent grantee, claiming under the State, because of the inherent nature of the purchase and contract, the payment of the purchase money, the deed of conveyance, the faith of the sovereign, plighted in its solemn legislative Acts and contract, and the guarantee of the Constitution of the United States. For, "It has become the established law of this Court" (the Supreme Court of the United States) "that a legislative enactment in the form of a statute, may contain provisions which, when accepted as the basis of action, by individuals or corporations, become contracts between them and the State, within the protection of the clause referred to of the Federal Constitution"—the clause declaring that no State shall pass any law impairing the obligation of a contract. *New Jersey* v. *Yard, 95 U. S., 113, 114.* Such, indisputably, is the case here.

By the terms of this contract there was imposed on plaintiff a duty, the only one in any way involved in or bearing upon this controversy, and on this Court's construction of which much of plaintiff's contention (except as to what is set out in paragraphs 12 and 13 of the complaint above referred to) must depend.

This duty is to furnish to the State, free of charge, on the line of the canal at the Penitentiary, *for the use of the Penitentiary*, 500 horse power of water power (§§ *2, 7, 21, A. A. 1887, 19 Stat. So. Ca., 1091, 1092, 1096*); a duty which the plaintiff has ever been ready and willing to perform from the time this duty attached, and of the non-performance of which there never has been, nor can

there be, complaint. Plaintiff's contention is, that the State is entitled to this amount of water power *qua* State, and only so, for the use of the Penitentiary, and for that use only, that use well defined by the State "for manufacturing purposes within the walls of the enclosure of the Penitentiary" (*A. A. 1866*, § *2*, *13 St. So. Ca.*, *393*), "for the use of the Penitentiary, to meet the demands of its ordinary operations and other industries conducted and carried on within its walls." *A. A. 1882*, § *6*, *17 St.*, *856*.

A fortiori, that in no event could this use extend beyond that by the State itself in its public institutions, where the same was needful for public wants and requirements, and least of all to the private gain and profits of corporations, the rivals of plaintiff in selling and leasing water power. The *gravamen* of plaintiff's complaint in this regard is that, under the authority of the State, defendant has diverted, and continues and will continue, unless restrained by the Court, to divert the horse power of water power furnished by plaintiff in the discharge of this duty imposed upon it for the use of the penitentiary from that use, and has applied, continues to, and will continue to apply this water power to its own private uses of profit and gain outside the walls of the Penitentiary, operating with it its electric lights and street railways, and selling, leasing, and furnishing this water power to various manufacturing and other industries, and thus bringing itself into successful competition with and underselling plaintiff in selling, leasing and furnishing the water power of the canal, the exclusive right, franchise, and privilege of which the plaintiff had acquired by the contract by which it purchased the canal, lands, rights, franchises and privileges conferred by the Acts of Assembly aforesaid. The plaintiff corporation, having been organized *inter alia*, "to utilize water power upon their own property, and to acquire by purchase, canals and other waterways, and to sell and lease the use of their water power from any canals it might own to any person or corporation, for the purpose of manufacturing of any description whatsoever," under its charter, October 5, 1891 (*20 Stat.*, *1512*, R. M. C. Richland County, Book A of Corporations, 32); and this canal and the exclusive right of selling and leasing the water power developed by it having been purchased by plaintiff, it will be seen at a glance that the objects alike of the formation of the plaintiff corporation and of the purchase of the canal, lands, rights, privileges and immunities, were, *pro tanto*, destroyed. Not content with this, the defendant forcibly made the entries and committed the continuous torts on the western embankment of plaintiff's canal, set out in paragraphs 12 and 13 of the complaint. *Record*, *pp. 9*, *10*, *fols. 19*, *20*.

Though all the corporators were citizens of States other than South Carolina, yet as plaintiff and defendant were both South Carolina corporations, the only tribunal to which plaintiff could have recourse was the Court of Common Pleas for Richland County, South Carolina, the county of the *locus*, for an injunction to re-

strain defendant from the unlawful diversion of the water power furnished by it for the use of the Penitentiary from that use to the private use and profit of the defendant, and from entering, trespassing and erecting and continuing the erection of buildings, works and machinery upon plaintiff's property, and requiring the removal of those already erected, and for an assessment of such damages as may have been done by defendant to plaintiff in the premises.

The defendant, in its answer, places the justification of the acts threatened and injuries done to plaintiff, which it admits, solely on the alleged ground that they found full warrant of law in the articles of agreement made between the Superintendent of the Penitentiary, for its Board of Directors, and the defendant, May 26, 1892, *Record, p. 16*, and the Act of the General Assembly of the State of South Carolina, ratifying and confirming the same, *A. A. December 24, 1892, 21 Stat. So. Ca., 95.* According to the South Carolina law and practice, the allegations of new matter in an answer, where it does not constitute a counter-claim, and there is no pretense of counter-claim here, are deemed controverted by plaintiff as upon a direct denial or avoidance, as the case may require, without further pleading; in such case there being no reply by plaintiff allowed, unless the Court should require it, on defendant's motion. *So. Ca. Code of Procedure, §§ 174, 189.* The controversion by plaintiff of this justification set up by the answer, was that the contract and Act of Assembly pleaded by defendant were in violation of those provisions of the Federal Constitution which inhibit a State from passing any law impairing the obligation of contracts, and from depriving any person of property without due process of law, in this, that they impaired the obligation of the prior contract with plaintiff as to its property and franchises, and deprived it of its property by simple legislative fiat.

The Circuit Court's decree (*Transcript of Record, pp. 20, fol. 38,*) was:

1. That the objection, raised orally by defendant's counsel, after the trial had commenced and been some time in progress (*page 20, fol. 37*), that the Court had no jurisdiction, because the State is an indispensable party, is overruled. The Court has jurisdiction to construe a contract made between the defendant and the State, whereby it is claimed that the contract rights of the plaintiff have been violated. The door is not shut to plaintiff because of defendant's contract with the State; the State has a right to come in, if she so wishes, but she declares that she will not come in (*Record, 15, fol. 29*), and the cause can be heard without her presence.

2. That under the proper construction of the State's contract with the plaintiff, the right and power of the State over the use and disposal of the 500 horse power of water power to be furnished by the plaintiff to the State, and over that 500 horse power of water power itself were not limited for the use of the Penitentiary or otherwise, but were absolute, unlimited and unrestricted, and

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that the State could dispose of, utilize, assign and transfer this water power in any way and for any uses and purposes she pleased.

3. That under the proper construction of the State's contract with the plaintiff, and the subsequent contract with the Board of Directors of the State Penitentiary, approved and ratified by the State, the State had lawfully given to the defendant absolute, unlimited and unrestricted right and power over this water power, and over the use and disposal of it; and there was in this subsequent contract and Act of Assembly no impairment by the State of the obligation of the State's prior contract with the plaintiff within the inhibition of the Federal Constitution.

4. That by the contract of the State with the plaintiff, Act of 1887 and conveyance of January 11, 1892, the plaintiff became the owner in fee of the western embankment of the canal, where the defendant, in February and May, 1893, committed the acts set out in paragraphs 12 and 13 of the complaint, alleged by plaintiff to be torts.

5. That the contract with defendant, made subsequent to that made with plaintiff, to wit: May 26, 1892, and the Act of Assembly of December 24, 1892, while they legalize and justify these acts of defendant committed in February and May, 1893, and give defendant the unquestionable right to put its electric plant, and the supplementary right to put in its steam plant, on the western embankment of plaintiff's canal, against plaintiff's objection, yet they do not in any wise impair the obligation of the State's prior contract with plaintiff, and do not in any wise deprive plaintiff of its property without due process of law.

6. There has been no impairment of the obligation of plaintiff's contract with the State, and no violation of its rights thereunder; therefore, it is adjudged, that the complaint be dismissed.

The cause was duly carried up to the State Supreme Court by plaintiff on appeal (*Record, p. 22, fol. 41,*) from so much of the decree of the Circuit Court:

(1) As holds that the defendant is a lessee of the water power reserved.

(2) As holds that there is any valid contract between the State and the defendant.

(3) And from all that portion of the decree commencing with and inclusive of the sentence (*Record, p. 20, fol. 39*), "plaintiff acquired its rights under the Act of 1887," and ending with and inclusive of the sentence, "Therefore, I hold that the complaint must be dismissed."

(4) And from the ordering and adjudging that the complaint be dismissed.

This appeal was heard by the State Supreme Court on exceptions taken by plaintiff and by defendant. *Record, pp. 23–25.*

Among plaintiff's exceptions, most of which charge, with more or less distinctness and precision, errors in the Circuit decree in

the decision of Federal questions adversely to plaintiff, in the construction of the contract with plaintiff, and the contract of the defendant, and the Acts of Assembly involved, and the rights of the parties to said contracts under these contracts and statutes, and as to whether the contract with defendant and of the Act of Assembly of December 24, 1892, are not within the inhibitions of the Federal Constitution, to all of which exceptions attention is called, it may suffice to call attention specially to the error in deciding No. 7, "That the State can dispose of its right to the 500 horse power of water power in any way the State pleases;" and to the errors in deciding Nos. 5, 1, 2, 4, 13, that the contract with defendant, and the Act of Assembly ratifying and confirming the same, give defendant all of the rights which the State had in this water power, without violating the State's prior contract with the plaintiff; and the error in deciding Nos. 8, 10, 11, 12, 13, that the contract with defendant, and the Act ratifying and confirming the same, give defendant the right to put the electric plant and the supplementary right to put in the steam plant, and to do the acts complained of in 12th and 13th paragraphs of the complaint, without violating the State's prior contract with the plaintiff; and to the errors in not deciding, as in No. 25, that the 500 horse power of water power to which the State is entitled under Act December 24, 1887, belongs to the State, as State, for the use of the South Carolina Penitentiary for State public purposes exclusively, is attached to and not severable from the State, as State, for the use of the Penitentiary, and to be used for said purposes, and said purposes only; and error in not deciding, as in No. 21, that the Act of December 24, 1892, mentioned in the 6th paragraph of the answer, is in violation of Section 10, Article 1, Constitution of the United States, declaring that no State shall pass any law impairing the obligation of contracts, in this, that it impairs the contract made by the State in A. A. December 24, 1887, as to the rights, franchises and privileges of the owners of the property known as the Columbia Canal, and the lands held therewith as owners in fee thereof, and more especially as to the sole and exclusive right, franchise and privilege to sell and lease the water power developed by said canal.

This Circuit decree was *res judicata*, and the law of the case until its reversal by two of the Judges of the State Supreme Court. The Constitution of South Carolina of 1868, then in force (*Art. IV., Sec. 12*), providing that "In all cases decided by the Supreme Court, a concurrence of two of the Judges shall be necessary to a decision," and the Code of Procedure (*§ 14, 2 Rev. St. So. Ca., 9,*) providing that "The concurrence of two Judges of the Supreme Court is necessary to pronounce a judgment." By the Constitution of 1868, then of force (*Art. IV., §§ 2 and 9*), the Supreme Court of that State then consisted of three Judges, to wit: a Chief Justice and two Associate Justices. It was further provided by the same Constitution (*Art. IV., § 8*): "When a judgment or decree is re-

versed or affirmed by the Supreme Court, every point made and distinctly stated in writing in the cause, and fairly arising upon the record of the case, shall be considered and decided, and the reasons therefor shall be concisely and briefly stated in writing, and preserved with the records of the case."

In this case, the sole portion of the Circuit decree as to which there was concurrence by two of the Judges of the Supreme Court, either in affirmance or reversal, was the *result* (*i. e.*, that the complaint be dismissed). *Record, p. 34, fol. 64, p. 21, last line; 43 So. Ca., 154-173.* From this it follows, *ex necessitate* and by established law, that, however valuable and however much entitled to respect the *individual* expressions of each of the three judges of the State Supreme Court may be as the *individual* opinions of three personages of high judicial rank, yet, in so far as regards this controversy, they are mere individual *obiter dicta;* so that the action here in question is that of the Circuit Court, affirmed *expressly* as to the result by the State Supreme Court, and in all other respects affirmed impliedly by the non-action of that tribunal.

"The points ruled in the Circuit Court were adopted and affirmed by the judgment rendered in the State Supreme Court in like manner that they would have been had two or all of its Judges concurred in affirming the judgment on all the grounds assumed by the Court below." *Lessieur* v. *Price, 12 How., 72; Ex parte Elliott, 33 S. C., 604.* So that while Nos. 1 and 4 of the above summary of the Circuit decree are unchallenged, *res judicata*, Nos. 2, 3, 5, and 6 thereof only come before this Court for consideration.

ERRORS ASSIGNED.

1. That error was committed in the judgment of the Supreme Court of the State of South Carolina, in affirming the judgment of the Circuit Court that the complaint be dismissed, and in deciding in favor of the validity of the contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the Act of the General Assembly of the State of South Carolina, December 24, 1892, ratifying and confirming the same, which were drawn in question on the ground of their being repugnant to the Constitution of the United States of America, in this, that they impaired the obligation of the contract made by the State of South Carolina with the plaintiff by Act of Assembly, December 24, 1887, Act of December 24, 1890, amending the same, and the conveyance of the property known as the Columbia Canal and the lands held therewith, by the Board of Trustees of the Columbia Canal to plaintiff, January 11, 1892—as to the lands, rights, franchises, privileges and immunities of plaintiff as owner in fee thereof, and more especially as to the western embankment of said canal, and plaintiff's sole and exclusive right and franchise to sell and lease the water power developed by said canal, and as to the 500

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horse power of water power to be furnished by plaintiff to the State, contrary to Art. I., § 10, of the Constitution of the United States; and in this that they deprived plaintiff of its land and other property without due process of law, contrary to 14th Amendment to said Constitution.

2. That there was error in deciding that, under the proper construction of the State's contract with the plaintiff, the right and power of the State over the 500 horse power of water power to be furnished by the plaintiff to the State, and over the use and disposal thereof were not limited for the use of the Penitentiary, but were absolute, unlimited and unrestricted, and that the State could dispose of, utilize, assign and transfer this water power in any way and for any uses and purposes she pleased.

3. That there was error in deciding that, under the proper construction of the State's contract with the plaintiff, and the subsequent contract made by the defendant with the Board of Directors of the State Penitentiary, and the Act of Assembly, December 24, 1892, confirming and ratifying the same, the State had lawfully given to the defendant absolute, unlimited and unrestricted right and power over this water power, and over the use and disposal of it, including the right and power to lease and sell it for defendant's private profit and gain; and that there was in this subsequent contract and Act of Assembly no impairment by the State of the obligation of the State's prior contract with the plaintiff, within the inhibition of the Constitution of the United States, Art. I., § 10.

4. That there was error in deciding that this subsequent contract with defendant, and Act of Assembly ratifying and confirming the same, while they legalized and justified the forcible entries and doings of defendant in February and May, 1893, on the western embankment of plaintiff's canal, set out in paragraphs 12 and 13 of the complaint, and give the defendant the unquestionable right to put the electric plant and the supplementary right to put in the steam plant on said embankment, against plaintiff's objection, yet do not in any wise impair the obligation of the State's prior contract with plaintiff, whereby the plaintiff became owner in fee of the canal, including said western embankment, in violation of the Constitution of the United States, Art. I., § 10, and do not in any wise deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of said Constitution.

5. That there has been no violation of plaintiff's rights.

While, for the reasons given, it does not seem to be at all necessary or in any wise required of plaintiff to make any assignments of error in the individual views expressed by any of the Judges of the State Supreme Court, yet, as some of these views may be relied on by the defendant in error as somewhat authoritative, *ex abundanti cautela*, it is deemed proper to make these assignments of error, in the opinion of Gary, A. J.:

1. That there is error in his holding that the State is an indispensable party to this action, in so far as equitable relief is sought.

2. That the use of the word "absolute," in § 7 of A. A. 1887, was for the purpose of creating a right in the State to this 500 horse power of water power, separable and distinct from the ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant, and its reservation was a right of *profit a prendre.*

POINTS OF LAW.

The questions before this Court are all questions of law, pure and simple. There was in the Courts below but one controverted question of fact—*i. e.*, whether the plaintiff had or had not acquired by its contract with the State. title from the State to the *locus in quo.* This is apparent from defendant's answer. Paragraps 1, 4, 6, *Record, pp. 12-14.* It is equally apparent that this question has been conclusively settled and adjudicated affirmatively in plaintiff's favor. The Circuit decree says: "The State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the property known as 'the canal property,' including its banks, as it existed at the time of the conveyance. And at the time of the Act of 1887, and of the conveyance made thereunder 11th January, 1892, the canal property covered the land upon which the defendant's works are erected." *Record, fol. 20, p. 38.* "The canal property included the strip of land upon which the steam plant was erected." *P. 27, fol. 50.* "A finding of fact, in effect, that the plaintiff is owner in fee of the land described in the complaint." *P. 34, fol. 64,* for whose extent see paragraphs 2 and 5 of complaint. *Record, pp. 2, 3, 4, fols. 6-9.* It was on the western embankment of the canal, portion of this land of plaintiff's, that defendant made the forcible entries, and committed the torts set out in paragraphs 12 and 13 of the complaint.

The questions of law involved naturally range themselves under two heads:

First. As to the injuries threatened and the injuries inflicted upon plaintiff's property, against its objection, by the forcible entries of defendant upon the western embankment of plaintiff's canal, the digging, excavation and removal of the earth, rock and works composing the foundation of the embankment, to the great damage thereof, and to the great danger of the safety of plaintiff's canal, the erection, without authority, of buildings and machinery upon this western embankment of plaintiff's canal, and the unlawful use of plaintiff's land and property.

Second. As to the diversion by defendant of the water power furnished by plaintiff to the State for the use of the Penitentiary, from that use to defendant's own private purposes and uses of gain and profit, and defendant's competition with plaintiff in leasing and selling the water power developed by plaintiff's canal.

First Head.

It is proper to premise that, under the law in South Carolina, and the Code of Procedure enacted by its Legislature, all the allegations of plaintiff's complaint, not denied by defendant's answer, are admitted. *So. Ca. Code of Procedure, §§ 170, 189; 2 Rev. St. So. Ca., pp. 75, 85; Addison* v. *Duncan, 35 So. Ca., 173.* It will be seen by the answer that none of the allegations of paragraphs 12 and 13 of the complaint are denied by the answer, save that in paragraph 4 of the answer there is a denial of *intention* by defendant to injure plaintiff by its acts, set out in 12th and 13th paragraphs of the complaint; and a denial also that the structures erected and maintained by defendant are located upon any land in which the plaintiff has any interest whatever. The denial of the intention to injure plaintiff, and the existence or non-existence of that intention, are alike equally immaterial in this controversy; for there is no demand for vindictive damages, but only for actual damages, compensation for the injuries, on the amount of which this intention or want of intention can have no effect whatever.

As to the denial that plaintiff has *any interest* in the bank of its own canal, on which defendant's structures are erected, this, as we have seen, has been effectually set at rest by the judgments of the Courts below that the plaintiff is owner in fee by conveyance from the State. That the acts alleged in the 12th and 13th paragraphs of the complaint were committed, as charged, upon plaintiff's property—not isolated and mere technical trespasses, but continuous torts, torts with a *continuando*, if torts at all, endangering the safety of plaintiff's canal, is *res judicata.* And while, for the reasons already given, the sole cause stated by McIver, C. J., of the State Supreme Court, and by him alone, for his concurrence in the result arrived at by that Court, "as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have *been erected* by defendant, for this does not depend solely upon the solution of a question of fact, as seems to be supposed" (*Record, 34, fol. 64*), is his mere *individual* doubt; yet it would seem that this solution of the question of law involved, if there be a question of law involved, should give satisfaction in this regard. "*Canal* is unlike the words river, pond, lake and other words used to designate natural bodies of water, the ordinary meaning of which is confined to the water itself; *but the word canal includes the banks.*" *Bishop* v. *Seeley, 18 Conn., 393.* Does it need reasoning or citation of authority to show that when the State, owning the canal, its banks and the circumjacent lands, conveyed this property in fee to the plaintiff, the plaintiff acquired from the State, as matter of law as well as of fact, title to the banks of its canal? and most especially against the State and its subsequent grantees, of all persons?

The whole controversy, outside of the questions of violation of the

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Federal Constitution, *is between* the rights of a prior and a subsequent grantee of the same property from the same grantor, and is settled by the old rule of Coke (Co. Litt., 14a), "*Quod prius est dignius*, and *qui prior est tempore potior est jure*." "This rule shows, says Sugden, in his argument in *Cholmondeley* v. *Clinton*, *2 Meriv., 329*, "that when parties come into Court and claim under conflicting rights, the Court will ask, not who was first in possession, but under what instrument, or how is your right dated in point of time." *Scott* v. *Scott*, *4 H. L. Cases*, *1065*, *1082*. Here plaintiff was first in time of possession, in instrument and in right.

Paragraph VI. of defendant's answer alleges that the State, by the Board of Directors of its Penitentiary, entered into the contract of May 26, 1892. This contract being at least an agreement made by the Board of Directors of the Penitentiary, the agents of the State, by its authority, is an enactment to which the State gave the force of law by the Act of December 24, 1892, and is a statute within the meaning of Rev. Stat., § 709, relating to the jurisdiction of the Court. It is so expressly decided. *Wright* v. *Nagle*, *101 U. S., 793; N. O. Water Works* v. *La Sugar Co.*, *125 U. S., 31; Williams* v. *Bruffy*, *96 U. S., 183; Jefferson Branch Bank* v. *Skelly*, *1 Black*, *443*, *last sentence on page; Mobile Railway Co.* v. *Nebraska*, *146 U. S., 446*, *447*. The prohibition of the 14th Amendment extends to all acts of the State, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeal*, *154 U. S., 45*.

Before considering the reasoning by which it is sought to justify in this regard this contract and Act of 1892, and the conduct of defendant having its sole defence thereunder set out in paragraphs 12 and 13 of the complaint, and to show that what the State did in no manner impaired the obligation of the State's prior contract with plaintiff, and did not deprive plaintiff of its property without due process of law, and that these acts of defendant were no violation of plaintiff's rights under its contract with the State, attention should be directed to the terms of the contract and Act of 1892, and the conduct of defendant in this regard.

This contract purports to lease to defendant, for thirty years, with provision for continuance thereafter, "all the land on the west side of the Columbia Canal, between the said canal and the river, opposite the walls of the Penitentiary." *This includes the portion of the western embankment, the western bank of plaintiff's canal, on which defendant erected and continues its structures, every foot of which is plaintiff's in fee simple, and so adjudged in this case.* This contract further purports to transfer to defendant for the same period other valuable property of plaintiff mentioned, and what it styles the privilege, but what is unquestionably the exclusive right of plaintiff *de jure et de facto* of quarrying and using the stone, earth and other material, the property of plaintiff, for the erection of bulkheads, water works, water ways, water gates, tail races, mason work

and buildings on plaintiff's property, for defendant's benefit, for the same period. *Record, p. 18, fols. 34, 35.* It is proper to call the attention of the Court specially to the fact, that prior to defendant's action set out in paragraphs 12 and 13 of the complaint, an agreement had been made and carried into execution, as to the *modus* of furnishing the State, for the use of the Penitentiary, with the 500 horse power of water power, which it was the duty of the plaintiff to furnish in accordance with its contract. *Paragraphs 10 and 11 of the complaint, pp. 7–9 of Record*, whose allegations in this regard are not denied, and, therefore, admitted. Defendant is confined to these specifications and plans of the *modus*, proposed by defendant itself, approved by plaintiff and carried into execution by defendant. *Gould on Waters, § 318a, and notes 3, 4, 5 and 6.* In *Altman* v. *McBride, 4 Strob. Rpts. (So. Ca.), 210, 212*, the Court says, as to these words in a deed of conveyance: "A square acre containing the family grave yard." No one would doubt that after the deed of conveyance was executed, the parties might mark out the precise spot, and if it should happen to be a few feet longer, or not exactly square, embracing a few square yards more than the area of an acre, it would not be in the power of either to alter it." And so *e converso*, if it should happen to be a few feet smaller, and not exactly square. Onthank v Lake Shore 71 N Y 194

But here the identical paper specifications, plans and *quantum* of land agreed to are exactly carried into execution. From this adjustment of the *modus* of the plaintiff's furnishing the water power to the State carried into execution, it necessarily follows that no justification for the subsequent conduct of the defendant, alleged in paragraphs 12 and 13 of the complaint, can be based on that portion of the contract which purports to lease this water power to defendant, even if it be granted, for the sake of argument, that the State could make such a lease of this water power as it has done, without coming within the inhibitions of the Federal Constitution. In regard to this conduct of defendant, it must always be remembered that it has, in addition to all other trespasses upon and injuries done to the property of plaintiff, against the objection of plaintiff, so dug, excavated and removed the earth, rock and works composing the foundation of the embankment of plaintiff's canal as to greatly damage the embankment and greatly endanger the canal itself.

The Circuit decree seems to rest its conclusion that the State's action in this regard does not come within the inhibitions of the Federal Constitution, and that defendant's conduct, set forth in 12th and 13th paragraphs of the complaint, is no violation of plaintiff's rights under its prior contract with the State, on the ground taken that the State has, by its subsequent contract with defendant, given to defendant "the *supplementary* right to *put in* a steam plant—to erect on the banks of plaintiff's canal so much

Injunction will lie against an excavation threatening serious injury to land or buildings having only right of support from adjoining land Farrand v Marshall

steam plant as is necessary to its work as a *supplement* to the water power which it has received from the State."

Upon the most cursory reading of the State's contracts with plaintiff and defendant, a host of objections spring up, each equally fatal to this portion of the decree. Attention will be called to only a few of the most obvious of these.

1. The State has no supplemental right to give. Its right was to be furnished with 500 horse power of water power—only this and nothing more. Courts may construe contracts, and in some cases it has been held that the Court, from the various terms of agreement between parties, some in consonance and some at variance with each other, some clear, some obscure, some ambiguous, some connected, some disconnected, some dependent, some independent, may construct a contract, but neither Court nor Legislature can supplement the contract rights of the parties to a contract.

2. The contract by none of its terms purports to give any such supplementary right. If so, it can be pointed out. *De non apparentibus, et non existentibus, eadem est ratio.*

An exemption from taxation of "any improvements that may be made upon the water power on the Matanancook stream, in the town of Lincoln, does not include steam power." *Plaisted* v. *Inhabitants of Lincoln, 62 Maine, 91.*

However admirable may be the logic of the Circuit decree, to wit: that "prudence and foresight justify the erection of a steam plant on the banks of a canal along a river where freshets come, and it is common to use steam as an adjunct to water power plants," maybe to show the *advisability* of defendant's erecting it on the banks of *its own* canal; yet it is most certainly a *non sequitur* to hold that, *ergo*, defendant has a *supplementary* right to erect a steam plant on the banks of *plaintiff's* canal. However common for owners of water power plants to erect steam adjuncts on their own land it may be, this certainly furnished no ground of supplementary right for defendant to erect them on the land of plaintiff, of whom it is the competitor, whether lawfully or not, in the selling and leasing of water power. Defendant has no right to such adjunct, or to what is of less moment, *adjutage. The Schuylkill Navigation Co.* v. *Moore, 2 Wharton, 477.*

Nor can this imaginary supplementary right derive any support from the merely individual view of Gary, A. J. (*Record, pp. 33, 34, fol. 63*), that the Circuit Judge found, as matter of fact, that defendant's right to erect a steam plant was merely incidental to and essential to the enjoyment of the use of the water power plant; for, *first*, he made no such finding; *second*, he made no finding of fact whatever on the subject; and, *third*, he simply, as mere matter of law, decided that by a proper construction of the contract, defendant had this supplementary right, and supported his construction by the logic before cited.

The construction put by the State Supreme Court on the con-

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tract and Act of 1892 is, for the purposes of this writ of error and case, to be taken by this Court as much a part of the said contract as if textually inserted therein, and to be accepted as conclusive, in judging whether it conforms to the Constitution of the United States. *Chicago, Milwaukee and St. Paul Railway Co.* v. *Minnesota, 134 U. S., 456; Ill. Cent. R. R. Co.* v. *Ill., 163 U. S., 142, 152; Mo. Pac. Railway* v. *Nebraska, 164 U. S., 446, 447; Lee* v. *Pillsbury, 105 U. S., 294; Leffingwell* v. *Warren, 2 Black, 603; State Bank of Ohio* v. *Knoop, 16 How., 391; Ins. Co.* v. *Treasurer, 11 Wall., 208, 209; Kaukanna Co.* v. *Green Bay and Miss. Canal, 142 U. S., 269; Chicago, St. Paul and Milwaukee R. R. Co.* v. *Minnesota, 146 U. S., 366; and authorities cited in Tucker's Argument in Spies* v. *Illinois, 123 U. S., 146.* That construction is, that this contract and Act justify and legalize the conduct of defendant, alleged in paragraphs 12 and 13 of the complaint, and do not conflict with § 10, Art. 1, nor Amendment 14, of the Constitution of the United States. Does it need argument to show that, in so far as this is concerned, the judgment of the State Supreme Court must be reversed?

Second Head.

Though the conclusion that the judgment of the State Supreme Court must be reversed, in so far as it relates to the matters decided, which are involved in and connected with this branch of the case, may not be so patent at first blush as it is in those involved in and connected with the first branch of the case; yet on examination it will be clearly found that the same result must be reached.

The basic difference under this head between the decision of the Court below and what plaintiff contends is the true view is this: The Court decides that under the contract of the State with the plaintiff and the proper construction of the Act of 1887, the exclusive right sold and conveyed to the plaintiff of leasing and selling the water power to be developed by the canal, is so limited and restrained by the provisions of that Act, imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, as that the right and power of the State *over* this 500 horse power of water power and *over* its use and disposal were absolute, unlimited and unrestricted, and that the State could dispose of and utilize it any way she pleased, and for any use and purpose she pleased; could divert it from use for the Penitentiary, and could assign and transfer it to a rival corporation of plaintiff for the private gain and profit of that corporation, as competitor with plaintiff in leasing and selling the water power developed by plaintiff's canal. Plaintiff contends that the provisions of the Act of 1887 imposing upon plaintiff this duty in no wise limit or restrict the exclusive right of plaintiff to lease and sell the water power to be developed by its canal, but merely impose upon plaintiff a duty to

furnish the State with this 500 horse power of water power *for the use of the Penitentiary, and for that use only*, without the right or power on the part of the State to divert it from the use of the Penitentiary, and lease or sell it to any one for any purpose; and that the State cannot divert it from the use of the Penitentiary to the use of a rival corporation, thus setting up a competitor of plaintiff in leasing and selling the water power to be developed by plaintiff's own canal, without impairing the obligation of the State's contract with plaintiff.

In limine, that by the provisions of the Act of 1887, this 500 horse power of water power to be furnished by the plaintiff to the State was to be furnished *for the use of the Penitentiary*, as plaintiff contends, is not only the true but was the universal construction, including that by defendant and the State, is shown in boldest relief by the terms of the description and recital of these provisions in the articles of agreement between the Board of Directors of the Penitentiary and the defendant, May 26, 1892, and the Act of December 24, 1892, ratifying and confirming the same; for in both of these both the State and defendant not casually admit, but articulately in terms assert, iterate and reiterate the fact that this 500 horse power of water was to be furnished to the State *for the use of the Penitentiary!!! Record, p. 16, fols. 30, 31, p. 18, fol. 35, 21 St., 94, 95.* It is the very refrain and chorus of the contract between the State and the defendant, and, as if to advertise and call attention to it by label, it is indelibly stamped upon it in the very title of the Act!!! Might not plaintiff successfully rest its case here? *Nonne cadit quæstio?* And with the information given by the very first reading of these articles of agreement and Act, as to what use the State purports and purposes to divert, and has diverted, and continues to divert, this 500 horse power of water power from the use of the Penitentiary, *nonne cadit altera quæstio*, as to this contract and Act impairing the obligation of the State's prior contract with the plaintiff? Assuming, for the sake of argument, if such an assumption could be for a moment allowed, that this is a valid contract between defendant and the State, would the State have the right to transfer the 100, the maximum horse power of water power reserved by defendant's contract for the use of the Penitentiary, to a rival corporation, thus enabling the latter to undersell defendant in selling and leasing water power of the canal, without violating its contract with defendant?

Before minutely considering the provisions of the Act imposing the duty of furnishing the 500 horse power of water power, glance a moment at plaintiff's rights.

Plaintiff is the owner, *inter alia*, of the canal, the lands held therewith, and of the franchise "to sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe." *A. A. 1887, § 21, 19 St., 1096.* Franchise, in England, is "a royal privilege, a branch of the King's prerogative, subsisting in the

hands of a subject." *Finch, 164.* In this country, the commonwealth stands in the place of the King, and has succeeded to all the prerogatives and franchises proper for a republican form of government. *Commonwealth* v. *Arrison, 15 Serg. & Rawle, 130.* It is in this country a special privilege conferred by government upon individuals, and which does not belong to the citizens generally as of common right. *Bank of Augusta* v. *Earle, 13 Pet., 595.* Privileges and immunities of a public nature which cannot legally be exercised without a legislative grant are franchises, although they never existed in the people or could be exercised by them in their political capacity. *Spencer, J., in People* v. *Utica Ins. Co., 15 Johns., 388.* They are particular privileges conferred upon individuals by grant from the government; incorporeal hereditaments, not only authorizing something to be done, but giving the owner the right of preventing all other persons from interfering with its exercise. *1 Lawrence & Rapalje's Law Dict., 543.*

They contain an implied covenant on the part of the government not to invade the rights vested. The government cannot resume them at pleasure, or do any act to impair the grant, without breach of the contract. An estate in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant that the government will not, either directly or indirectly, interfere with it so as to impair its value. Every such interference, whether it be by *the creation of a rival franchise* or otherwise, would be in violation or in fraud of the grant. All grants or franchises ought to be so construed as to give them due effect, *by excluding all contiguous competition*, which would be injurious and operate fraudulently on the grant. The common law contained principles applicable to this subject, dictated by sound judgment and enlightened morality. It declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for disturbance, and in modern practice he usually resorts to chancery to stay the injurious interference by injunction. *3 Kent, 458-9.* The most valuable of modern franchises are the various kinds of *lawful, exclusive privileges or monopolies*, such as the exclusive right to supply cities and towns, given to gas and *water* companies and numerous other corporations, endowed with similar franchises, or with such others as more or less *exclude competition* by the very nature of the privileges bestowed; the right to exclude competition, being for its own benefit, can be relinquished only by the grantee, and cannot be taken away from it by State legislation, because such legislation impairs the obligation of a contract. *8 Amer. & Eng. Encyc. of Law, 598-9, 614; N. O. Gas Co.* v. *La. Lt. Co., 115 U. S., 650-673; Woodruff* v. *Trapnal, 10 How., 187; Gibbons* v. *Ogden, 9 Wheat., 74; Slaughter House Cases, 16 Wall., 65.* The doctrine of *Phyfe*

v. *Wardell*, *5 Paige*, *268*, and *Armon* v. *Alexander*, *10 Paige*, *571*, that even the good will of a lease which the landlord is in the habit of renewing is property, and rights growing out of it by contract or otherwise will be protected and enforced by a court of equity, is cited with approbation in *Davis* v. *Gray*, *16 Wall.*, *227*, *228*, which case goes on to say that the right to acquire and sell particular real estate is a franchise, and that the act of incorporation and land grant there were contracts and within the protection clause of the Federal Constitution. *16 Wall.*, *232*; *Campbell* v. *Hort*, *115 U. S.*, *628–630*. And so of the franchise here to lease and sell the water power, as well of the land which plaintiff purchased and had title for. The valuable privilege which conduced to the purchase. *State Bank of Ohio* v. *Knoop*, *16 How.*, *380*.

In order to determine whether the plaintiff's exclusive right to sell and lease the water power to be developed by its canal is in any manner affected, and, if so, in what manner, by the provisions of the Act of 1887 imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, all the provisions of the Act relative thereto must be examined and considered together, so as to make, if possible, a consistent whole, without conflict between any of the provisions. These provisions are in these sections:

§ 2, where, among the enumerated purposes for which the Board of Trustees of the Columbia Canal are authorized, empowered and directed to improve and develop the canal, is the one stated in these words, "*for providing an adequate water power for the use of the Penitentiary.*"

§ 7. "The Board of Trustees shall * * * furnish to the State, *free of charge*, on the line of the canal, 500 horse power of water power; to Sullivan Fenner or assigns, 500 horse power of water power, under his contract with the Canal Commission; and to furnish the city of Columbia 500 horse power of water power, at any point, between the source of the canal and Gervais street, the city may select. * * * *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute; and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right." [This section was deemed necessary, because, by §§ *9*, *10 et seq.* of the Act, there was set on foot a financial scheme by which the Board of Trustees were empowered to mortgage the canal and lands held therewith, to secure the payment of bonds to the amount of $200,000 and interest, which the Trustees were therein authorized to issue.]

§ 21. "The Board of Trustees may sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power *at the Penitentiary*, and 500 horse power of water

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power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia."

By § 2 of an Act of December 24, 1890 (*20 St., 968*), to amend this Act of 1887, it was so amended as that the Board of Trustees should have full power and authority, before the canal had been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, *and all the rights and franchises* conferred by this Act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby.

Under this Act, the canal property was sold and conveyed to plaintiff in 1892. Can the words of the Act of 1887, imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, by any recognized principle of interpretation, any approved canon of construction, be so tortured as in any manner to limit or restrict the exclusive right of plaintiff, purchased by it, to sell and lease the water power to be developed by its canal? Can they be expanded into any obligation of greater import than that the vendee and owner of the canal property shall furnish to the State 500 horse power of water power, *free of charge, on the line of the canal, at the Penitentiary, for the use of the Penitentiary?* In the consideration of this question, attention is specially called to these fundamental rules in the construction of contracts, "that the Courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of all the same light which the parties possessed when the contract was made." *Merriam* v. *U. S., 107 U. S., 441.* "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties, and the question always is, what the parties mutually understood by the language." *Davis* v. *Patrick, 141 U. S., 689.* "The Court is not only at liberty but required to examine the entire contract and the circumstances under which it was signed. The intent of the parties must be gathered from the character of the conveyance, *the nature and situation of the property conveyed, and of the property excepted, and the purpose of such exception.*" *Rock Island Railway* v. *Rio Grande Railroad, 143 U. S., 614.*

"The language written is read and interpreted in the light of the circumstances which prompted it, and to which it always tacitly refers." *State* v. *Smith, 12 Rich. So. Ca., 442.*

It is also an elementary rule, in the construction of statutes, that "all Acts *in pari materia* are to be taken together as if they were one law" (*Lord Mansfield, in The Earl of Ailesbury* v. *Pattison, 1 Douglas, 30; Rex.* v. *Loxdale, 1 Burr, 445*), "because they are considered as having one object in view, and as acting upon one system; though some of the statutes may have expired. The object of the rule is to ascertain and carry into effect the intention;

and it is to be inferred that a code of statutes referring to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." *3 Kent, 463.*

It was the hope, the dream, of the State to have the canal pass from the State's hands into such hands as would cause large manufacturing industries to spring into existence on its banks, whose machinery should be worked by the water power developed by it, and that she herself should be furnished from it by the owner of the canal free of charge, with a supply of water power for the use of the Penitentiary, which was in part the eastern boundary of the canal, adequate to meet the demands of the ordinary operations of the Penitentiary and of the other industries conducted and carried on within its walls. This is historical, and is traceable through all the canal legislation which is permeated by it. All the previous efforts of the State in this regard had resulted in the bitter ashes of disappointment. The large fruitage which has now come is through the plaintiff's purchase.

In the "Act to authorize the sale of the Columbia Canal," December 21, 1865, *13 St., 310*, the first act passed for that purpose, there is no reservation for the use of the Penitentiary, for there was then no Penitentiary; but in the "Act to provide for the establishment of a Penitentiary," September 21, 1866, *13 Stat., 393*, § *2*, it is made the duty of the Commissioners of the Penitentiary "to select and procure a proper site, if practicable, *where water power may be made available for manufacturing purposes within the enclosure* [in accordance with which the site of the Penitentiary was located on the eastern bank of the canal], on which to erect suitable penitentiary buildings, with sufficient space to enlarge and improve the same from time to time as may be necessary." § 4. "The labor of the convicts to be directed to such available branches of industry as will best contribute to the support of the institution." And in the "Act to amend an Act entitled 'An Act to authorize the sale of the Columbia Canal, ratified the 21st day of December, 1865,'" approved December 19, 1866, *13 Stat., 408*, § *2*, the third section of the former Act, was so amended as to read: "That the Commissioners already appointed [to sell and convey the canal] be authorized to sell at public or private sale, at their discretion: *Provided*, That in any sale that may be made by said Commissioners *there be a reservation to the State of water power sufficient for the purposes of the State Penitentiary for all time, free of charge.*" In the Act to authorize the sale of the Columbia Canal, September 21, 1868, *14 Stat., 84*, § *4*, are the same words of reservation of water power of the canal for the purposes of the State Penitentiary. § 4. "The Commissioners hereby appointed are authorized to sell said property at public or private sale, at their discretion: *Provided*, That in any sale they may make, *there shall be a reservation to the State of water power sufficient for the purposes of the State Peni-*

tentiary for all time, free of charge." This Act, though amended twice in other particulars, was untouched in this. Act February 8, 1869, *14 St., 177;* Act February 28, 1870, *14 St., 367.*

Under the Act of September 21, 1868, there was a sale and conveyance of the canal property to the purchaser, Samuel A. Pearce, Jr., as trustee for Wm. Sprague, January 7, 1869; this reservation to the State of water power sufficient for the purposes of the State Penitentiary for all time, free of charge, being inserted in the conveyance. For default made in the conditions imposed in the deed of conveyance, the title to the premises conveyed by the deed reverted to the State. A. A. June 7, 1877, *16 St., 316;* A. A. February 14, 1878, *16 St., 360.*

There was next passed "An Act to authorize and empower the appointment of a Commission to control and direct the development and disposal of the property of the State known as the Columbia Canal and its appurtenances," approved March 12, 1878. *16 St., 445.* § 4 provides that "In all grants that may be made, *sufficient power shall be reserved to the State for the use of the Penitentiary and the city of Columbia.*"

There was then next passed "An Act to authorize the Canal Commission to enter into a contract for the sale of the canal to David M. Thompson and Augustus F. Neagle," approved December 23, 1879, by § 9 of which Thompson and Neagle were to give to the State, between the Columbia Water Works and Senate street, 1,500 horse power of water power, to be used or disposed of in such manner and on such terms as the State may direct. The Penitentiary is within this area, and it is evident, from the legislation *ante* and *post*, that of this 1,500 horse power of water power, 500 was for the city of Columbia, 500 for Sullivan Fenner under his contract with the Canal Commission, and 500 for the use of the Penitentiary. No deed of conveyance of the canal property was ever made to Thompson and Neagle, and they executed a release of all their rights to the State under this Act and the contract made thereunder.

There was then next passed "An Act to authorize the Canal Commission to transfer and deliver to the Board of Directors of the South Carolina Penitentiary the property known as the Columbia Canal, with the lands held therewith, and its appurtenances, and to develop the same," approved February 8, 1882. *17 St., 855.*

§ 2 is: "That the said Board of Directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; *and for the purpose of providing an adequate water power for the use of the Penitentiary* and for the other purposes to be hereinafter named, they are authorized, empowered and directed to improve and develop the same."

These other purposes are set out in § 6: "That the said Board of Directors are authorized to furnish to the city of Columbia, for the

purpose of operating its water works and for other purposes, 500 horse power of water power; and to Sullivan Fenner, under his contract with the Canal Commission, 500 horse power of water power; and *after reserving for the use of the Penitentiary a power sufficient to meet the demands of its ordinary operations and other industries conducted and carried on within its walls*, they are further authorized, with the Comptroller General on behalf of the State, to lease to other persons or corporations water power." Read now the provisions of the Act of 1887, before cited, and if there had been doubt before as to its interpretation in this regard, for which plaintiff claims there is no legitimate ground, can there be a lingering doubt in the radiance which these lights throw around it, that the 500 horse power of water power to be furnished to the State was for the use of the Penitentiary, and for that use alone? The subject-matter and all the surrounding circumstances, the situation of the parties, their mutual understanding, the universal construction, the nature and situation of the property conveyed, of the duty imposed upon the owner of the canal, and the sole purpose for which it could have been imposed, the *situs* of the Penitentiary with reference to the canal, the whole continuous current of the Legislature, have a convergent force, which is irresistible, as to the sole use to which the State was bound, morally and legally, to apply this 500 horse power of water power, if there be any potency whatever either in good faith or the constitutional inhibition in the Federal organic law against State legislation impairing the obligation of contracts. The amount of this power—500 horse power—was that fixed by the State as the maximum required to meet the demands of the ordinary operations of the Penitentiary and the State industries conducted and carried on within its walls, these words stamped in by the canal legislation, showing with no uncertain sound what was meant by *for the use of the Penitentiary*. This amount, with the 500 for the city of Columbia and the 500 for Sullivan Fenner, making up the 1,500 in the Thompson and Neagle Act. The power of the State, the Board of Directors of the Penitentiary and of the Board of Trustees of the Columbia Canal to lease and sell water power of the canal had been bought by, conveyed to and vested in the plaintiff, if money can buy a franchise and solemn deeds can convey it. Great stress is laid in the decision below on the use of the word *absolute*. And it is commented on, *con spirito*, as much as if the Act by this expression had repealed all the prior legislative expressions of the will of the State as to what use this water power was to be devoted, and had in terms nullified the expressions in §§ 21 and 21 that it was to be furnished at the Penitentiary for the use of the Penitentiary. At the time of the passage of the amendatory act of December 24, 1890, authorizing the sale of the canal and all its appurtenances, the lands held therewith, and *all the rights and franchises conferred by the Act of 1887* on the Board of Trustees of the Columbia Canal,

it never entered the legislative mind that, under the guise of requiring 500 horse power of water power to be furnished by the purchaser of this property as the amount required for the ordinary operations of the Penitentiary and the State industries conducted and carried on by the convicts within its walls, it was reserving to itself the right and power to transfer this water power from this use to supply the stock in trade of a rival corporation, whom it would thus make a successful competitor of the purchaser it was tempting by the exclusiveness of the franchise—the purchaser the object of whose corporate existence and of whose investment in the purchase would be, *pro tanto*, alike destroyed. The legislative conscience would have shrunk back with recoil from such a proposition. With what force and truth is it said in *Mobile and Ohio R. R. Co.* v. *Tennessee*, *153 U. S., 502:*

"In the construction of the statutory laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of many of the provisions in them. *Preston* v. *Browder*, *1 Wheat, 120; U. S.* v. *Union Pac. R. R.*, *91 U. S., 79, 80, 81; Winona and St. P. R. R.* v. *Barney*, *113 U. S., 61.* Legislative contracts especially should be read *in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made*, rather than at a later period, when different ideas and different theories may prevail. There is always a tendency to construe statutes in the light they appear when the construction is given. It is easy to be wise after we see the results of experience. But in endeavoring to ascertain what the *Congress of* 1862 [Legislature of 1887, 1890] intended, we must as far as possible place ourselves in the light that Congress [the South Carolina Legislature] then enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attendant circumstances." Plaintiff contends that its construction is not only the natural and rational one, but carries out precisely the public policy entertained and the purposes sought to be accomplished at the time it was made. Further, that it is the construction which not only fitly follows the *animus* and intent of the preceding legislation, and carries out the purposes of the State, but the one which, while making a consistent whole of the act, gives its proper force and effect to all the provisions of the Act, including that in which the word of imputed magic, *absolute*, is used. "The right of the State shall be absolute." But what right of the State? Right of the State to what? The Act answers: "The right of the State to the *free* use of the *said* 500 horse power." Free—*i. e.*, free of charge. The opening clause of the section puts this beyond peradventure. "The Board of Trustees shall * * furnish to the State *free of charge*, on the line of the canal, 500 horse power of water power"—*said* 500 horse power, *i. e.*, the 500 horse power of water power already mentioned, which the Board of Trustees shall furnish to the State, § 7, for

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the use of the Penitentiary, thus providing an adequate water power for the use of the Penitentiary, § 2, on the line of the canal, § 7, and later still more definitely stated as to the *locus*, to wit: at the Penitentiary, which had its site on the eastern bank of the canal, designedly, in order from its juxtaposition to the canal, the more readily to receive from it an adequate water power for its use. To the sense in which the word absolute is here used the rule applies in full force, *noscitur a sociis;* the word free—*i. e.*, free of charge—and the words immediately following absolute—"and *any mortgage*, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right," *i. e.*, the right to be furnished by the owner of the canal, whatever might be the mutations in its ownership and whatever liens might be placed upon it by any of its successive owners, with what was deemed an adequate water power (500 horse power) for the use of the Penitentiary, should always be unaffected thereby. This may have been unnecessary to effect this object, the other terms of the Act perhaps sufficiently providing for it; but as the State was about parting with the ownership and possession of the canal property, and its darling and praiseworthy object, the getting from the canal an adequate water power for the use of the Penitentiary, being possibly menaced by the large mortgage authorized to be put upon the canal property, it was deemed best, *ex abundanti cautela*, to put the water power for the use of the Penitentiary beyond peradventure. "This extent it hath and no more." To give it more, such as is given by the Court below, is to inject into the word a meaning which, as used here, it does not import, and which the context shows to be equally far-fetched and fallacious—mayhap ingenious, certainly not ingenuous. It is not a right *over* this water power, not a right to dispose of it in any manner the State pleased, but a right to it for the use of the Penitentiary, and that use alone, defined not only by the whole canal legislation, but expressed both in spirit and letter in the Act itself.

N. B.—Great additional force is given to plaintiff's construction by the notable fact, that while stringent obligation is put upon the successive owners of the canal that the duty to furnish this water power to the State for the use of the Penitentiary is not to be affected by any mutations in its ownership, there is no provision made for its continuance in the event of the Penitentiary ceasing to exist, or the Penitentiary *situs* and buildings passing into other hands, or for this right passing into other hands.

It is not seen how the view of Gary, A. J., can prevail, that by the contract between the plaintiff and the State, the use of the word "absolute" was for the purpose of creating a right in the State to this 500 horse power, separable and distinct from the ownership in other property, and not dependent upon any particular lands to which it may be appurtenant, and that it was a right of *profit a prendre*, without ignoring the terms of the contract, both their

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letter and spirit, the well-settled principles of construction of contracts and statutes above recited, important and well settled fundamental law, the whole history of the canal legislation, and fixing upon the State that it has held out false lures to the plaintiff, an innocent purchaser. If A, a private person or corporation, had been the owner of the canal property and of a manufacturing establishment located where the Penitentiary is, and had, for value, vested in the plaintiff the same estate, property, rights and franchises which have been vested in it by the Acts of Assembly of 1887 and 1890, and the conveyances thereunder, and by the contract there had been a duty imposed on the *plaintiff* and his successors to furnish A with 500 horse power of water power at the manufacturing establishment, for the use of the manufacturing establishment, the absolute right to the free use of which was reserved by A, and any mortgage, assignment or transfer of the canal should always be subject to this right—what would be the relative rights and position of A and the plaintiff? By the weight of authority, the right of A would have been that of owner of a dominant tenement, a right appurtenant annexed to the manufacturing establishment, and the duty imposed upon plaintiff would have been a servitude of the canal property as servient tenement to the manufacturing establishment, the dominant tenement. The right of A, as owner of the dominant tenement, would be appurtenant, attached to, and an incident to the land, and would pass with it, whether the land be for a term of years, for life or in fee, and could not be separated from or transferred independent of it. *Kollee* v. *Knecht*, *99 Ill.*, *366*; *Wagner* v. *Hanna*, *38 Cal.*, *116*, *117*. A covenant running with the land; covenants running with incorporeal as well as with corporeal hereditaments. *Van Rensselaer* v. *Reed*, *26 N. Y.*, *563*. No one can have such right but he who has the realty to which it is appendant.

If the right of A would not be that of owner of the dominant tenement, a right appurtenant and annexed to the manufacturing establishment, then it would be a right in gross, personal to the owner, dying with the possessor, incapable of alienation, not transferrable, and cannot be made so. In neither event could the assignee of this have the right to take anything, or have the right to this duty being performed by plaintiff for such assignee's private gain and profit by diversion from the use of the manufacturing establishment. *Peck* v. *Conway*, *119 Mass.*, *546–9*; *Ackroyd* v. *Smith*, *10 Common Bench*, *1 J. Scott*, *187*, *70 E. C. L.*; *Savage* v. *Mason*, *3 Cushing*, *505*; *Spensley* v. *Valentine*, *34 Wisc.*, *160*; *Noonan* v. *Orton*, *4 Wisc.*, *535*; *Keppel* v. *Bailey*, *2 M. & K.*, *537–8*; *7 Eng. Ch.* The doctrine of *Ackroyd* v. *Smith* is the settled law of South Carolina, peculiarly strong in favor of plaintiff's contention in this regard. *Whaley* v. *Stevens*, *21 S. C.*, *237*, *27 S. C.*, *560*; *Fisher* v. *Fair*, *34 S. C.*, *208*; *Morse* v. *Garner*, *1 Strob.*, *514*.

Assignee of the rent reserved out of the original estate of the grantor, in an action against a person to whose use the premises were granted subject to the rent, has neither privity of contract nor privity of estate in respect to the covenant, and the covenant must be regarded as a covenant in gross. Lord Ellenborough said he failed to see how the analogy, as it regards covenants which run with the land, was to be applied, unless it could be shown that it was land, as it might as well have been applied to any covenant respecting a matter merely personal; and he inclined to view the language ascribed to Lord Holt, in *12 Mod., 170* (*Brewster* v. *Kidgill*), "that the assignee of the rent should have covenant against the grantor, because it is a covenant annexed to the thing granted," as extra-judicial. But, putting aside that *dictum* of Lord Hoet with respect to a grant by a tenant in fee of a rent charge out of lands, he found no authority to warrant the position that in the case of a conveyance in fee to certain uses, one of which was that the grantor should receive a rent, a covenant to pay the rent would run with it to an assignee thereof. *Milnes* v. *Branch, 5 M. & S., 417; 2 Rob. Pr., 80–83, end of § 8, 85, end of § 95*, and authorities there cited, among them *Ackroyd* v. *Smith, 70 E. C. L., 187; Morse* v. *Garner, 1 Strob., 519.*

The assignee of a collateral covenant (a covenant beneficial to the lessor, without regard to his continuing the owner of the estate,) cannot sue upon it. It does not pass to him. *Vivyan* v. *Arthur's Administratrix, 1 Barn. & Cross., 410; 8 E. C. L., 115; Best, J., in Vernon* v. *Smitt, 5 Barn. & Ald., 1; 7 E. C. L., 7; 2 Rob. Pr., 92.*

The right of action of a lessor, for a breach of covenant by his lessee, cannot be extended to his assignee, without his being named in the covenant, when the subjeet-matter of it does not relate to a thing *in esse* at the time of the demise. The water power was not developed, was not *in esse* at the passage of the Act of 1887. *Grey* v. *Culbertson, 2 Chitty, 482; 18 E. C. L., 397; 4 Doug., 351; 26 E. C. L., 398; Doughty* v. *Bowman, 11 Adol. & Ell., N. S., 448; 63 E. C. L., 447; Spencer's Case, 4 Co., 16a, and authorities cited; 2 Rob. Pr., 83, 92, 93.*

That the right of the State is not a right of *profit a prendre*, but an easement. See *Godard on Easements, p. 771; Gould on Waters, §§ 299, 310; Angell on Water Courses, §§ 142, 143, 7th ed.; Manning* v. *Wasdall, 2 Harr. & Woll., 441; 3 Kent, 427; Hill* v. *Lord, 48 Me., 49; Post* v. *Pearsall, 22 Wend., 433; Prince* v. *Heator, 70 N. Y.. 421; Ritzer* v. *Parker, 8 Cush., 147; Huntingdon* v. *Asher. 96 N. Y., 505.* The right to this water power comes within the very limitations cited by Gary, A. J., from *Hall* v. *City of Ionia, 38 Mich., 423*, making it dependent on lands to which it is appurtenant, and not having a separate and intrinsic importance; for the facts confine it both to a special place (the Penitentiary) and to a specified purpose (the use of the Penitentiary), a right

which the State cannot sell or lease. *Rochdale Canal Co.* v. *Radcliffe, 18 Adol. & Ell., N. S., 307–311; 83 E. C. L.*

But the case at bar is an infinitely stronger case for plaintiff than in the case supposed of A, a private person or corporation, the owner of the canal property and of a manufacturing establishment located where the Penitentiary is, conveying to plaintiff what has been vested in it by the Acts of Assembly and the conveyances thereunder; for the Court takes judicial cognizance and is informed by the Acts of Assembly quoted that the Penitentiary was established for utilizing convict labor in purposes of the State, *qua* State, and that this water power was to be specially devoted to its ordinary operations and industries conducted and carried on within its walls. This right was not assignable or transferable. "Rights arising out of contract cannot be transferred if they involve a relation of personal confidence, and the party conferring those rights must have intended them to be exercised by him only in whom he actually confided." *Arkansas Smelting Co.* v. *Belden Co., 127 U. S., 388; Pollock on Contracts, 4th ed., 425. A fortiori*, where these rights are to be exercised only at a specified place, and for a specified purpose, a State purpose of public utility. *Strong* v. *Benedict, 5 Conn., 219; Turletott* v. *Phelps, 4 Gray, 374; Sibley* v. *Hoar, 4 Gray, 222; Garland* v. *Hodson, 46 Me., 515; Washabaugh* v. *Oyster, 6 Pa. St., 497; Deshon* v. *Porter, 28 Me., 289; Stockbridge Iron Co.* v. *Hudson Iron Co., 107 Mass., 309, 324, 291.* "Call this right an easement or what you will," to use the language of the Circuit decree, the State cannot by any law she may pass divert this water power from the specified public purpose to which she advertised purchasers of the canal that it was to be devoted and used for, to the use, gain and profit of a private rival corporation, to assist in competing with plaintiff in the selling and leasing of water power developed by plaintiff's canal, without impairing the obligation of the contract made by plaintiff with the State, and depriving plaintiff, *pro tanto*, of the fruits of its purchase without due process of law.

Besides all this, the restriction to the *locus*, the Penitentiary, and the restriction to the purpose, the use of the Penitentiary, as matter of fact, the State had let fall the management of the canal, discontinued its appropriations, and did not go into the business of leasing water power and manufacturing for gain, and as matter of law could not. "The State has not the right to engage in any trade or business for gain." *Mauldin* v. *Greenville, 33 S. C., 1.* What the State cannot do directly, it cannot do indirectly. "*Qui facit per alium, facit per se.*"

With respect to what is said by Gary, A. J., individually (*Record, p. 28, fol. 52*), based upon his own views expressed in *Heyward* v. *Farmers' Mining Co., 19 S. E. R., 963, 42 S. C., 138*, as to the complaint alleging two causes of action, it need only be said that it is perfectly competent, and not at all unusual, for plaintiff to

manifestly designed to be made an appurtenance to an existing structure for a particular purpose to be accomplished by the

allege that trespasses and injuries have been continuously committed by defendant upon his rights and property, and that trespasses and injuries are threatened and about to be committed by defendant upon his rights and property, and to pray for injunction against the latter and compensatory damages for the former in one and the same complaint. *Tyler* v. *Maguire, 17 Wall., 284, 285;* and in South Carolina, both in the *ante-Code* practice, *Bird* v. *R. R. Co., 8 Rich. Eq., 46; 64 American Decisions, 739; Lamar* v. *R. R. Co., 10 S. C.. 480,* and in the practice under the Code, *Busby* v. *Mitchell, 29 S. C., 452.*

The individual view expressed by Gary, A. J. (*Record, p. 30, fol. 56*), as to the State being an indispensable party, in so far as equitable relief is sought, is on the same line with the views expressed by him in *Butler* v. *Ellerbe, 44 So. Ca., 266,* and which were his solely, and not concurred in, being only a dissenting opinion in so far as this subject is at all concerned. The sentence quoted by him to sustain his view, from *In re Ayres, 123 U. S., 500,* expressly says that the very ground on which *Osborn* v. *Bank U. S., 9 Wheat., 578,* was adjudged not to be a suit against the State, *and not to be one in which the State was a necessary party,* was that defendants, personally and individually, were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken or its value, and that, therefore, it was a case in which no other parties were necessary. This is precisely the case at bar. If it should be said that is true only at law and not in equity where injunction is sought, as seems to be the individual view of Gary, A. J., full answer thereto is made by the very case of *Osborn* v. *Bank U. S.,* and the subsequent cases decided by this Court on that subject, all of which have in this regard tracked that case. It is only necessary to read the sentence immediately preceding the one extracted by the Associate Justice: "One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since." And it was there decided, in the strongest and most emphatic manner, that the State was not a necessary party. This case, too, is not one of mere trespass, but of continuous and dangerous trespasses, threatening irremediable injury and the safety of plaintiff's canal. That the State is not an indispensable party in this action is *res judicata* in this case, and *Osborn* v. *Bank U. S.* is the highest and most conclusive authority that this adjudication is correct. It is there said: "It is admitted that the privilege of the principal is not communicated to the agent, for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury." [Here Gary, A. J., after a process of reasoning and citation of authority, arrives at the conclusion that the State is not a necessary party in so far as the *legal,* as distinguished

Structure" Knotts v Hydrick 12 Ru

from the *equitable*, features of the action are concerned.] "It being admitted, then, that the agent is not privileged by his connection with the principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made as a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he be not restrained from its commission, if no other party can be brought before the Court?" *9 Wheaton, 343.* Can any authority be stronger, clearer or more directly applicable? "The interference of the Court in this class of cases, the protection of parties in the enjoyment of a franchise, has most frequently been to restrain a person from violating an exclusive franchise by participating in it." *9 Wheat., 341.* In that case, the questions arising from "the character of the principal as a sovereign State" were elaborately discussed and clearly decided, and its decision that *in consimili casu*, such as in the case at bar, applications for the equitable relief of the Court by injunction against the wrongs and trespasses of individual wrongdoers, the State was not an indispensable party, has been uniformly followed. This is abundantly shown in *Poindexter* v. *Greenhow, 114 U. S., 293; Allen* v. *B. & O. R. R., 114 U. S., 311; Pennoyer* v. *McConnaughty, 140 U. S., 10–18; In re Tyler, 149 U. S., 490.* And this principle is as strongly admitted in the cases decided where the State has been held to be a necessary party as in those cases where it has been held not to be—*e. g.*, the cases relied on by the Associate Justice, *Hagood* v. *Southern, 117 U. S., 70*, where the judgment below was a judicial proceeding against the State itself—*117 U. S., 69; Cunningham* v. *Macon and Brunswick R. R. Co., 109 U. S., 452*, where the effort was to foreclose a mortgage upon and sell property to which the State had the legal title, and of which it was in actual possession—*109 U. S., 457;* and *In re Ayres, 123 U. S., 500.*

In *Briggs* v. *Life Boats, 11 Allen, 161–165*, the life boats against which it was attempted to enforce a lien were owned, held by and in the possession of the United States for public uses, and as instruments for the execution of their sovereign and constitutional powers. None of this class of cases have any application to or bearing on the case at bar adverse to defendant. That, independent of the special decisions of this Court covering the very point in question, the equity rule as to parties invoked, can have no application here, would seem to be patent from the highest authority. *Lord Eldon, in Attorney General* v. *Jackson, 11 Vesey, 367*, and in *Adair v. New River Company, 11 Vesey, 444*, and in *Cockburn* v. *Thompson, 16 Ves., 325; Sir Thomas Plumer, Master of the Rolls, in Menx* v. *Maltby, 2 Swanston, 295–300; Lord Col-*

tenham in Wallworth v. *Holt*, *4 Mylne & Craig*, *635*, *636*; *Wiser* v. *Blatchly*, *1 Johns. Ch.*, *437*; *Ex parte Martin*, *58 Am. Dec.*, *321*; *Bank* v. *Hastings*, *Mich. St.*, *1 Doug.*, *225*; *Story Eq. Pl.*, §§ *77*, *78*, *note 2*, § *135a*. By the Acts of Assembly and the conveyances thereunder, the plaintiff has title to and possession of the *res*, the whole of the water that flows down the canal, with only the duty imposed by its contract to furnish 500 horse power of water power for a specific use at a designated place. The position that the State is an indispensable party in so far as equitable relief is concerned, when stripped of artificial garb, is, that because defendant bases its justification for torts threatened and about to be committed on plaintiff's rights and property, involving irremediable injury thereto, on authority from a third person, *ergo*, that third person is an indispensable party to test the rights of plaintiff for injunction against those torts; and until such third person impossible to be made a party is made a party, plaintiff can not have a hearing of its plaint. The law throws no such transferred or transferable protection and shield around wrongdoers, and it makes no difference who that third person is. It must be remembered that though plaintiff succeeds, the State still has its 500 horse power of water power, its only right in the premises. It is not unworthy of note that this objection was not interposed until the case had been some time on trial, and then only orally, and that the South Carolina Code is express that a defence of defect of parties defendant must be interposed in the pleadings by demurrer or answer, and if defendant does not thus make it, such defence is waived. *So. Ca. Code*, §§ *165*, *166*, *168*, *169*. *Ita lex scripta est*, and *ita lex judicata est*, without distinction as to whether *legal* or *equitable* relief is sought. Of the former class, *Ross* v. *Linder*, *12 S. C.*, *593*; *Bowden & Earle* v. *Winsmith*, *11 S. C.*, *441*; *Commercial Insurance and Banking Company* v. *Turner*, *8 So. Ca.*, *111*; *Liberian &c. Company* v. *Rodgers*, *21 S. C.*, *33*; of the latter class, see *Featherston* v. *Norris*, *7 S. C.*, *484*, *485*; *Evans* v. *McLucas*, *12 S. C.*, *61*; *Daniels* v. *Moses*, *12 S. C.*, *137*. Plaintiff relies on the strength of these positions and the authorities sustaining them for a reversal of the judgment of the State Court on the matters embraced in and connected with this head with the same confidence it does for a reversal thereof on the matters embraced in and connected with the first head.

With full consciousness of the strength of these positions, defendant in error sought to elude the reversal of the judgment of the Court below, and moved this Court to dismiss the writ of error for want of jurisdiction in this Court, on the ground that no Federal question was involved in the judgment and decision of the State Court. The Record and this Brief, plaintiff respectfully submits, show most conclusively that, with the single exception of deciding in favor of plaintiff, that the plaintiff was the owner in fee simple of the *locus in quo*, a matter now *res judicata* and no longer in contest,

the judgment and decision of the State Court were, in truth, law and fact, the decision of Federal questions and nothing else, and that their decision was necessary to the determination of the cause. As plaintiff's view of *this question* has already been presented, somewhat elaborately and at length, and it is thought fatally to defendant's motion, plaintiff asks that the printed argument submitted by it at the last term *contra* the motion to dismiss be taken as part of this argument. Plaintiff can see nothing *as to the matters* involved in and connected with the first or second heads of this Brief, or with defendant's motion to dismiss the writ of error for want of jurisdiction, which can debar plaintiff from the full relief sought from this Court. "By the very terms of the statute, *14 St. U. S., 385, Feb. 6, 1867*, when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that Court is authorized to render such process and enforce it by its own process." *Murdock* v. *Memphis, 20 Wall., 632.* In this cause the questions are exclusively of Federal law. "When this Court has once acquired jurisdiction, it may send its process in the enforcement of its judgment to the appellate Court of the State, or to the inferior Court whose judgment is reversed." *Williams* v. *Bruffy, 102 U. S., 356.* In this case, this Court, by its judgment, can grant the injunction sought by plaintiff and adjudge the assessment by the State Circuit Court of such damages as have been done plaintiff in the premises, and send its process directly to that Court.

LEROY F. YOUMANS,
For Plaintiff in Error.

AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE COLUMBIA CANAL WITH THE LANDS NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME.

SEC. 1.—Canal and lands adjacent released to Trustees. Forfeiture.
SEC. 2.—Trustees to take possession and develop.
SEC. 3.—Dam line and size of Canal, banks, &c. Fish ways.
SEC 4.—Right of way.
SEC. 5.—Open for navigation. Right of State.
SEC. 6.—Bridges over Canal.
SEC. 7.—When to be completed. Horse power to State, city and Fenner.
SEC. 8.—Use of convict labor.
SEC. 9.—Trustees authorized to borrow $200,000.
SEC. 10.—Mortgage of Canal and Lands.
SEC. 11.—Description of bonds and coupons. City guarantee.
SEC. 12.—Registry. Sale by Trustees. Limit of price.
SEC. 13.—What to be endorsed on bonds and expressed on their face.
SEC. 14.—Registry of bonds sold. Annual report.
SEC. 15.—Penalty for fraudulent conduct.
SEC. 16.—Power to purchase and lease lands. Rental of power.
SEC. 17.—Exemption from taxation.
SEC. 18.—Trustees to pay interest after 1893. Sinking fund. Transfer to city.

SEC. 19.—To secure land before extending South of Gervais street.
SEC. 20.—Trustees, number, term of office and election.
SEC. 21.—Incorporation. Officers. Sale or lease of water power.
SEC. 22.—Vacancies.
SEC. 23.—Transfer of property to city.
SEC. 24.—Duration of Act. When to take effect.

SECTION 1. *Be it enacoed* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: *Provided*, That should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State.

SEC. 2. That the said Board of Trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the Penitentiary and for other purposes herein named, they are hereby authorized, empowered and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as, by survey already made or hereafter to be made, may be deemed advisable for the development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet at the South side of Gervais street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said

dam; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water 150 feet wide at the top of the water, 110 feet wide at the bottom and ten feet deep, and shall develop at least 10,000 horse power at the South side of Gervais street: *Provided, further*, That suitable fish ways for the free passage of fish be constructed in the said dam.

SEC. 4. That the said Board of Trustees shall have the right of way, and the same is hereby granted, in and along said course of the canal, for the construction and operation of the same; if in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private property of any person or corporation for that purpose, the said Board of Trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad River and Congaree River, and the transportation of supplies to market, shall have the right to acquire such right of way in the manner now provided by law.

SEC. 5. That the said canal shall be opened for navigation free of charges by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the Board under this Act: *Provided*, The said Board of Trustees or lessees of the water power are indemnified against any damage arising therefrom.

SEC. 6. That the said Board of Trustees are required to build only one bridge over the canal, to wit: one on Gervais street. That the said Trustees or assigns shall not be required to build any draws or passage ways through any other bridges across the canal, unless they voluntarily build additional bridges and draws or passage ways therein shall become necessary for purposes of navigation; and if such draws and passage ways or bridges other than those above provided for should be built, they shall not be required to work the same except for their own benefit, nor shall they be required to attend on any locks which may be built.

SEC. 7. That the Board of Trustees shall, within two years from the ratificatiou of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is

practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right.

SEC. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, for furnishing the said water power to the State and to the city of Columbia, the Board of Directors of the South Carolina Penitentiary shall furnish to the order of the said Board of Trustees such convicts as may from time to time be in the Penitentiary unemployed and not under contract and are now allowed by law to be employed or worked outside of the walls of the Penitentiary: *Provided*, That the convicts who shall be employed on the canal may at any time be leased by the Board of Directors and forthwith withdrawn from the work on the canal; that the employment of such convicts shall not interfere with the right of the Board of Directors in leasing and hiring convicts as is now or may hereafter be provided by law: *Provided, further*, That the said convicts shall be worked under the supervision of the Superintendent of the Penitentiary and work according to the plans adopted by the Trustees.

SEC. 9. That to secure the speedy development of the said canal, the Board of Trustees shall have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent. per annum, to negotiate the same, and to use the proceeds for the construction of the said canal.

SEC. 10. That the said Board of Trustees shall have the power to mortgage the canal, with the land held therewith and all its appurtenances, to secure the payment of the principal and interest of the said bonds.

SEC. 11. That $100,000 of the said bonds shall be made payable the first day of January, A. D. 1918, and the remaining $100,000 of the said bonds shall be made payable on the first day of January, A. D. 1919. That one moiety or half of each class of bonds shall be of the denomination of $1,000 and one-half of the denomination of $500. Each shall have coupons attached, and shall bear interest at the rate of six per cent. per annum. The first coupons on the bonds maturing January the 1st, 1918, to be be payable July the 1st, 1888; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of the said bonds; that the first coupons of the bonds maturing the first day of January, 1919, shall be made payable on the first day of July, 1889; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of these last mentioned bonds, to wit: January 1st, 1919. Each and all of the said bonds shall be signed by the Chairman of the Board of Trustees and countersigned by the Secretary and Treasurer

of the said Board. Each and every coupon shall have the fac simile of the written signature of the Chairman and the Secretary and Treasurer imprinted thereon. On the back of each and every bond shall be printed the following words: The city of Columbia, South Carolina, guarantees the prompt payment of each and every coupon attached to this bond, which shall be signed by the Mayor of the city of Columbia and countersigned by the City Clerk and Treasurer and attested by the corporate seal of the said city; and the said bonds shall not be negotiable without this guarantee is signed by the said Mayor and City Clerk and Treasurer.

SEC. 12. That the said Board of Trustees shall keep a registry of the bonds signed, showing the number and amount of each bond and coupons attached. That when the bonds are signed by the Mayor and the City Clerk and Treasurer of the city of Columbia, they shall immediately thereafter be turned over to the said Board of Trustees of the Columbia Canal. That the said Board of Trustees sha'l have power to negotiate the sale of the bonds payable January 1st, 1918, forthwith; and the funds arising therefrom shall be used for the development of the said canal. That after the 1st day of January, 1889, the said Board of Trustees shall have the power to issue and sell the remaining $100,000 of bonds authorized to be issued under this Act, and devote the proceeds to the development of the said canal: *Provided*, The said Board shall not sell any bond for less than 90 per cent. of its face value.

SEC. 13. That the said Board of Trustees of the Columbia Canal shall cause an accurate abstract of the contents of this Act to be printed on the back of each of the said bonds, and on the face of each bond it shall be expressed that the same is issued under the authority of this Act.

SEC. 14. That the said Board of Trustees shall keep a correct registry of each bond sold, the number and amount of the bond, the party to whom sold and the amount received, and shall annually report to the City Council a true abstract therefrom.

SEC. 15. That if any member of the said Board of Trustees shall fraudulently issue any of the said bonds or fraudulently dispose of any money arising from the sale thereof, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine and imprisonment at the discretion of the Court.

SEC. 16. That the said Board of Trustees may, at discretion, purchase or lease any land adjoining the Columbia Canal which they may think beneficial to the successful development of the canal, and may sell or lease any land on the canal, to be used for manufactories or to facilitate the navigation of the canal. That they may also during the years 1888 and 1889, at their discretion, contract to furnish water power at three dollars or less a horse power per year for ten years, to any party who will put up a factory of 10,000 spindles, or any factory which they may think of equal importance for the development of the canal. That after the year

1889 no water power shall be sold for less than five dollars a horse power per annum.

SEC. 17. That the land, the canal and the appurtenances thereof, transferred to the said Board of Trustees of the Columbia Canal, and the bonds issued by them, shall be exempt from taxation, except for State purposes; that the buildings hereafter erected and the lands hereafter acquired shall be taxable, unless they are exempted under the general tax law of the State.

SEC. 18. That the said Board of Trustees shall after the year 1893, pay the interest on the said bonds each and every year, if practicable for them to do so; and as soon thereafter as they shall be able, from the proceeds of the rental of the water power of the canal, they shall create a sinking fund, in bonds issued by the said Board, which shall immediately be cancelled, or to be invested in bonds of the State of South Carolina: *Provided*, They can be purchased at a premium of 7 per cent., or less; and as soon as practicable the Board of Trustees shall pay all the bonds issued by the said Board, and then transfer the Columbia Canal and its appurtenances to the city of Columbia: *Provided, further*, That the city of Columbia may at any time, with the consent of the bondholders and other creditors of the said Board, take possession of the Columbia Canal, with all its appurtenances, upon assuming all the liabilities of the said Board and indemnifying its members from loss.

SEC. 19. To insure the prompt development of the said canal, and to enable the Board of Trustees to offer inducements for the speedy erection of factories on the canal below Gervais street, the said Trustees are authorized and required, before they shall employ any of the proceeds of said bonds in developing the canal below Gervais street, to secure, by contract or purchase, and control, land on the canal south of Gervais street, with frontage sufficient for at least two mill sites suitable for the erection of factories of 20,000 spindles each.

SEC. 20. That the said Board of Trustees of the Columbia Canal shall consist of five members. The Mayor shall be a member *ex officio;* the Mayor and Aldermen of the city of Columbia shall elect the other four, one from the City Council, the other three from the citizens of Columbia at large. The Mayor and the Aldermen elected shall hold their membership during the time they are members of the City Council; the other three shall hold their office for four years. The members of the Board of Trustees shall be elected by the Mayor and Aldermen of the city of Columbia at the meeting of the City Council which is held to declare the result of the vote of the legal voters of the city of Columbia authorizing the Mayor and Aldermen to guarantee the payment of the interest on the bonds to be issued by the said Board of Trustees or as soon thereafter as practicable.

SEC. 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be

"Board of Trustees of the Columbia Canal." Its officers shall be a Chairman and a Secretary and Treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; may sell or lease the water power of the canal subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the Penitentiary, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the Secretary and Treasurer as they may deem proper.

SEC. 22. That all vacancies caused in the Board of Trustees by death or from other causes shall be supplied by election by said Board, except in the case of the Mayor and the Aldermen elected by the City Council, who hold their places by virtue of their office.

SEC. 23. The said Board of Trustees, as soon as they have fully developed the said canal, and secured the payment of the debts contracted by them in its development, they shall turn over the canal with all its appurtenances to the city of Columbia.

SEC. 24. That this Act shall be of force for thirty-one years, and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

W. L. MAULDIN,
President of the Senate.
JAMES SIMONS,
Speaker House of Representatives.

Approved December 24th, A. D. 1887.

J. P. RICHARDSON,
Governor.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE COLUMBIA CANAL, WITH THE LANDS NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME," APPROVED DECEMBER 24TH, 1887.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That Section 3 of an Act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith and its appurtenances,

and to develop the same," approved December 24th, 1887, be, and is hereby, amended so as to read as follows:

SECTION 3. That in order to improve and develop the power of said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as by survey already made or hereafter to be made may be deemed advisable for the development of the said water power; and in locating and constructing the said dam they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water, with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said canal; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water one hundred and fifty feet wide at the top of the water, one hundred and ten feet wide at the bottom, and ten feet deep, and shall develop at least ten thousand horse power at the south side of Gervais street: *Provided, further*, That for a distance of about fifty-three chains southerly from the south line of Gervais street the minimum dimensions of said canal shall be one hundred and fifty feet width at normal level of the surface of the water in the canal when completed, one hundred and ten feet width at the bottom, and ten feet depth; thence southerly for fourteen chains the canal shall be uniformly diminished so as to have the minimum dimensions at the southerly end of said fourteen chains of one hundred and twenty feet width at normal level of the surface of the water in the canal when completed, eighty feet width at the bottom, and ten feet depth; and these latter minimum dimensions shall continue to the terminus of the canal, a distance of about sixty-seven chains: *Provided, further*, That suitable fishways for the free passage of fish be constructed in the said dam.

SECTION 2. That Section 23 of said Act be, and the same is hereby, amended so as to read as follows:

SECTION 23. That the said Board of Trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this Act on said Board

of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said Board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia; and before such sale, alienation and transfer is made, thirty days' notice of the offer to purchase and the terms thereof shall be given to the Council of the city of Columbia.

Approved December 24th, A. D. 1890.

AN ACT TO RATIFY AND CONFIRM THE CONTRACT MADE AND ENTERED INTO BY AND BETWEEN THE BOARD OF DIRECTORS OF THE SOUTH CAROLINA PENITENTIARY AND THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY FOR THE DEVELOPMENT OF THE FIVE HUNDRED HORSE POWER OF WATER POWER RESERVED BY THE STATE OF SOUTH CAROLINA FOR THE USE OF THE SOUTH CAROLINA PENITENTIARY, ALONG THE LINE OF THE COLUMBIA CANAL.

Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Electric Street Railway, Light and Power Company for the development and utilization of the 500 horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and whereas the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company for the development and utilization of the said water power, upon certain terms expressed in the contract; and whereas the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed thereon water wheels for the development of the said 500 horse power of water power, and erected thereon all necessary buildings, shafting, etc., with all necessary water wheels, gate ways, and other structure for the complete development and use of the said water power, and has in all other respects fully complied with the terms of the said contract; now, therefore,

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said

contract by and between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company for the development of the said water power be, and the same is hereby, ratified and confirmed; subject, however, to all of the conditions, limitations and restrictions in the said contract provided.

Approved December 24th, A. D. 1892.

ERRATA IN TRANSCRIPT OF RECORD.

Page. Folio.

5, 11, for "1891," read "1892."
5, 11, for "farnchises," read "franchises."
6, 12, first line, for "hindreance," read "hindrance."
6, 13, for "only," read "duly."
6, 13, strike out "and."
6, 13, fill —— with "in."
7, 14, for "was," read "were."
8, 16, strike out "and."
8, 16, strike out "so.'
9, 18, strike out "or."
12, 24, for "cabal," read "canal."
14, 27, strike out "d" after "work."
14, 28, for "Buchnana," read "Buchanan."
16, 31, for "weels," read "wheels."
16, 31, for "contact," read "contract."
17, 33, for "contarct," read "contract."
18, 34, strike out "h" in "exhonerate."
20, 38, for "contarct," read "contract."
24, 45, in second line of 21, read "answer" for "complaint."
26, 49, for "Tenner," read "Fenner."
27, 51, in first line strike out "sub-" before "defendant."
28, 52, for "argumrnt," read "argument."
28, 53, for "then," read "them"—last line but one of page.
29, 54, for "mentioned," read "maintained."
29, 55, for "presons" read "persons."
32, 61, for "munber," read "number."
33, 62, for "divisable," read "devisable."
33, 62, strike out "[illegible] capable."
36, 70, for "1897," read "1887."
37, first line, for "see," read "sell."
37, third line, strike out "to."

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FIRST.

The argument filed April 15, 1898, for defendant in error, in reply to argument filed May 10, 1897, for plaintiff in error, *contra*, motion to dismiss or affirm, is considered to have been fully answered in anticipation by that argument for plaintiff in error; still plaintiff in error also submits the following rejoinder to defendant's reply:

The statement of the two questions presented in the State Courts should be as follows, rather than as given on page 1 of this argument for defendant in error:

1. Whether the contract of Talbert, Superintendent of the Penitentiary, with defendant, and the Act of Assembly ratifying and confirming it, 1892, whereby the power is conferred upon defendant to apply to its own private uses of profit and gain, outside the walls of the Penitentiary, and sell, lease, and furnish to purchasers the 500 horse power of water power (which plaintiff is bound by its contract to furnish for the use of the Penitentiary), in competition with plaintiff, who is purchaser for value from the State of the right to sell and lease the water power of the canal, subject to such rules and regulations as plaintiff shall prescribe, by prior contract with the State, 1887, does not impair the obligation of such prior contract, and deprive plaintiff of its property without due process of law?

2. Whether the defendant's contract, ratified and confirmed by the Act of Assembly, 1892, giving defendant the right as construed by the State Court to commit the acts set out in paragraphs 12 and 13 of the complaint, does not impair the obligation of the former contract of plaintiff with the State, 1887, and deprive plaintiff of its property without due process of law?

The three cases first cited on page 2 of this argument for defendant in error, while holding, as quoted, that where the constitutionality of the statute of a State is in issue, the construction given to such statute by the highest Court of that State, must be accepted by this Court in judging whether such statute conforms to the Constitution of the United States, most expressly decide that this Court has jurisdiction as the ultimate tribunal to judge whether such statute as so construed conforms to that Constitution.

Thus, in the case first cited, *Chicago, M. & St. P. Railway Co.* v. *Minnesota*, *134 U. S.*, *456*, this Court, after the holding cited for defendant in error, adds: "This being the construction of the statute by the Supreme Court of Minnesota, by which we are bound in considering the present case, we are of opinion, that so construed it conflicts with the Constitution of the United States in the particulars complained of."

The case cited, *Ill. Cent. R. R.* v. *Ill.*, *163 U. S.*, *152*, *153*, decides that the decision of the State Supreme Court, holding the State Statute there in question as construed by it not to be in vio-

lation of the Constitution of the United States, was clearly reviewable by this Court, and this Court held that the requirement of the Act there challenged was an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States; the judgment of the State Supreme Court, *contra non obstante.*

In the remaining one of the three cases cited for the defendant in error, *Mo. Pac. Railway* v. *Nebraska, 164 U. S., 415–417,* this Court, after laying down the proposition cited, proceeds to consider the constitutionality of the State Statute in question, and reversing the judgment of the State Supreme Court, holds that the provision of the statute challenged was, in essence and effect, the taking by a State of the private property of a corporation without the owner's consent, for the private use of others,—was not due process of law,—and was a violation of the fourteenth Article of Amendment of the Constitution of the United States.

This jurisdictional question had been decided a score of times before, *N. O. Water Works* v. *La. Sugar Co., 125 U. S., 36, 37, 38;* and if it were not so, the jurisdiction of this Court in that regard would be practically *nil.*

The construction given by the State Courts to State legislation and State Constitutions is not conclusive upon the Supreme Court of the United States, when it is called upon "to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries in conformity with State legislation." *Wright* v. *Nagle, 104 U. S., 794; Jefferson Branch Bk.* v. *Skelly, 1 Black, 443; Ohio Ins. & Trust Co.* v. *Debolt, 16 How., 432, 433; State Bank of Ohio* v. *Knoop, 16 How., 391; Buttz* v. *City of Muskatine, 8 Wall, 582–584; Township of Pine Grove* v. *Talcot, 19 Wall, 678.*

Whether there was a contract, if so, what its effect was, and whether subsequent Statutes have impaired its obligation, are questions of which this Court, Supreme Court United States, always has jurisdiction, and is not bound by decision of State Court. *University* v. *People, 99 U. S., 321; L. & N. R. R.* v. *Palmes, 109 U. S., 244, 256, 257; Wright* v. *Nagle, 101 U. S., 791, 794; Vicksburg &c., R. R. Co.* v. *Dennis, 116 U. S., 667.*

When a party to a suit sets up that under one Statute a State made a contract with him, and that by a subsequent statute it violated the contract, and the highest Court of law or equity of a State has held that such subsequent Act was a valid Act, and decreed accordingly, the jurisdiction of this Court, under § 25 of the Judiciary Act, attaches. *The Binghampton Bridge, 3 Wall., 57.*

There is no relevancy whatever in the citation on page 2 of the argument from *Oxley Stave Co.* v. *County of Butler, 166 U. S., 649,* nor in the citation on page 4, there being no question of fact adequate to determine the controversy between the parties, and broad

enough to maintain the judgment, independent of the Federal question, determined adversely to plaintiff in error.

There was, in truth, no question of fact whatever, determined adversely to plaintiff in error.

To eradicate fully any impression favorable to defendants in error, which it seeks to make by the citation from the record on page 2 of the argument, it is necessary only to read the sentence from the *Record, p. 31, fol. 59*, immediately preceding the sentence with which the citation commences, showing that the contract whose construction is spoken of is the contract of defendant, 1892, not the contract of plaintiff, 1887.

"Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is whether or not *the contract between the State and the defendant* relative to the 500 horse power of water power is null and void." [This contract, May 26, 1892, is set out *pp. 16–19*, inclusive of *record.*] "*This* contract received legislative construction when it was ratified by the Act of the Legislature hereinbefore mentioned" [A. A. December 24, 1892, *page 38* of Brief of plaintiff in error, *ante*], "and although such construction is not binding on this Court, still *it*" [the construction placed by the Legislature, December 24, 1892, on the contract with the defendant, May 26, 1892], "shows the intention of the State *when*" [Act December 24, 1887, *pp. 30–36* of Brief of plaintiff in error, *ante*], "*it*" [the State] "reserved the 500 horse power of water power." [Read in connection with this the extract from *Mobile & Ohio R. R. Co.* v. *Tennessee, 153 U. S., 502, p. 22 of Brief of plaintiff in error, ante.*] "We think the construction placed upon *said* contract" [the contract with defendant, May 26, 1892], "in 1892 by the Legislature as to the 500 horse power reserved to the State, was in harmony with the terms of *said* contract, the proviso to section 7 of the Act of 1887, being that the right of the State to the free use of the said 500 horse power should be absolute."

The Act of December 24, 1892, does nothing more than ratify and confirm the contract of May 26, 1892, and unequivocally declare that the 500 horse power of water power was reserved by the State of South Carolina *for the use of the South Carolina Penitentiary along the line of the Columbia Canal.* A statute of a State ratifying and confirming a contract made by its agents, must, *ex vi termini*, be in harmony with the terms of that contract.

Nor can the contention of defendant derive any support whatever from the citation on page 3 of the merely individual view of Gary, A. J., *Record, pp. 33, 34, fol. 63*, in which he stands entirely alone, that the right of defendant to erect the steam plant on the banks of plaintiff's canal, depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water power plant, and that it must be assumed that the Circuit Judge

properly decided all questions of fact upon which his judgment had necessarily to rest. No such question of fact ever arose; the Circuit Judge made no such finding of fact; he made no finding of fact whatever on the subject; but as mere matter of law decided that by a proper construction of the contract, May 26, 1892, defendant had this *supplementary* right. *Record 21, fol. 40, Brief of plaintiff in error, pp. 12–13.*

The only relevancy which the citation, page 3 of argument for defendant in error, from *Egan* v. *Hart, 165 U. S., 188*, has, is to emphasize the doctrine that the finding of the Circuit Court, *Record, p. 20, fol. 38*, affirmed by the State Supreme Court, *Record, p. 27, fol. 50, p. 34, fol. 64*, on the only disputed question of fact, to wit: that the plaintiff was the owner in fee of the canal property, including its banks, covering the land upon which defendant erected its works,—is conclusive.

But even were plaintiff in error to concede, which it does not, or were it true, which it is not, that the Supreme Court of South Carolina did not pass upon the Act of 1892 or the contract of May 26, 1892, but based its decision solely upon the Act of 1887, still, as the State Court upholds the subsequent law of 1892, on the ground that the contract—Act of 1887—did not confer the right claimed;—as the judgment of the highest Court of the State, by its terms and necessary operation, gives effect to a subsequent provision of the State law claimed by the plaintiff in error to impair the prior contract;—as by the judgment of the State Court the subsequent statute has been brought into play and effect given to its provisions, which statute is claimed by the plaintiff in error to impair the obligation of the prior contract;—as the highest Court in the State construes the first statute creating a contract in such a manner, as that the second statute, which is alleged to impair the obligation of that contract, does not impair it, whereby the second statute remains valid under the Constitution—the validity of the second statute is clearly drawn in question under the 25th section of the Judiciary Act of 1879, and within the meaning of § 709 of the Revised Statutes of the United States, and the jurisdiction of this Court unquestionably attaches. The authorities in argument for plaintiff in error, *contra* motion to dismiss or affirm, filed May 10, 1897, *pp. 5–7 and p. 16*, are full to and conclusive upon the point.

SECOND.

The argument for defendant in error on the merits, filed March 8, 1897, is considered to be fully answered by what has gone before in this argument, still the following reply is submitted by plaintiff in error to that argument for defendant:

As to the statement of the two questions involved in this case, page 3, made for defendant, somewhat differently phrased from that made for him, page 1 of the argument in the argument in reply, on the motion to dismiss or affirm, *see ante.* Not abstracts, but the two Acts entire referred to, p. 4, are set out in the Brief for plaintiff in error, *pp. 30–39;* as also the contract of the Board of Directors of the South Carolina Penitentiary, is set out entire in the *Record*, *pp. 16–19.*

As to subdivision A of division 1 of defendant's argument, that the plaintiff did not acquire title in fee to the banks of its own canal upon which defendant's works, as alleged in paragraphs 12 and 13 of the complaint, were erected *in invitum* against the plaintiff, it is submitted:

1. That there is and can be no such question before this Court:

a. because the plaintiff only has taken steps to reverse the findings of the State Court, and the rule is settled in this Court, that a party who does not take such steps cannot take advantage of an error committed in the decree against him. It is only by a cross proceeding that the party in whose favor the Court below has decided, can do so. *Chittenden* v. *Brewster*, *2 Wall., 196; Kelsey* v. *Western*, *2 N. Y. Comstock, 505; Sands* v. *Codwise*, *4 Johns., 602;* and cross appeals must be prosecuted like any other appeals. *The S. S. Osborne*, *105 U. S., 451.*

b. because it is a question of *fact* directly decided by the State Circuit Court and unreversed by the State Supreme Court.

The statement, page 7 of defendant's argument, that "the only finding of fact in the Circuit Court decree was that the works are located on the land covered by the Rawls deed," is a clear misapprehension. To show this, it is only necessary to *re*-cite the extract cited for defendant, page 5 of his argument, correctly punctuating it, as in the *Record*, *page 20*, *fol. 39:* "As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff *in fee*,—all of the property known as the 'Canal property,' including its banks as it existed at the time of the conveyance; and at the time of the Act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works are erected."

There is not the slightest foundation whatever for defendant's view, page 7, that it is a fair inference from his concurrence in the result, that Justice Pope was of the same opinion as that *attributed by defendant* to Chief Justice McIver, to wit: that he conceived the question of the character of plaintiff's title to be a question of law.

For while the Chief Justice says, "I concur in the result," and proceeds to give as his reason therefor, the ground of his faith, or rather *quoad hoc*, the ground of his want of faith, as to whether the plaintiff ever acquired title to the land upon which defendant had erected the works in question; Justice Pope says only, "I concur in the result," and—closes; only that and nothing more, thereby most manifestly, inferentially at least, if not expressly, refusing concurrence in the reason assigned by the Chief Justice for his concurrence in the result. The expression used above, the opinion *attributed by the defendant* to the Chief Justice, to wit: that he conceived the question of the character of plaintiff's title to be a question of law, was used not without reason, for this is only another of defendant's inferences. What the Chief Justice said was this: "Whether plaintiff ever acquired title to the land upon which the works in question have been erected, does not depend *solely* upon the solution of a question of fact, as seems to be supposed."

The question of title to land is a question of fact—in truth, the question of fact most commonly referred by courts of equity to the courts of law for trial by a jury. That the question of title to land, and whether plaintiff is entitled to the possession of land, are questions of fact, was expressly decided in South Carolina, in *Robertson* v. *Sharpton*, 17 S. C., 592, more fully stated in manuscript decision No. 128, April Term, 1892, by the Supreme Court of South Carolina, McIver (C. J. then), A. J., delivering the opinion of the Court without dissent.

As to any question of law, whether this land, the embankment of plaintiff's canal, is plaintiff's, *see plaintiff's Brief, page 10, ante*, and *Bishop* v. *Seeley*, *18 Conn., 393*. All the plats, diagrams, maps, tracings, written plans and specifications, used on the trial and exhibited to the Court on Circuit, were by agreement of counsel filed with the Clerk of the State Supreme Court, and exhibited to that Court in the discussion before it of defendant's exception to the Circuit decree. "*2.* Because the Circuit Judge held that the plaintiff was seized in fee of the land upon which the works were erected by the defendant." *Record, p. 23, fol. 42, bottom of page 5 and top of page 6 of defendant's argument.* Under these circumstances the Circuit decision, *Record, p. 20, fol. 39*, that the State conveyed the entire canal property, including its banks, to the plaintiff *in fee*, unreversed by the State Supreme Court, entirely destroys all the idea suggested for defendant, *page 13* of his argument, that plaintiff, instead of having title to the banks of its canal, as it has to the canal itself, has only an easement therein, and is conclusive upon this Court.

2. The statement, page 9 of defendant's argument, as to the canal ever being sold or conveyed to Thompson and Nagle, is a mistake. *See plaintiff's Brief, p. 20.*

3. The only portion of subdivision A of division 1 of defendant's argument which has any real pertinency to any of the issues in-

volved in the cause, is the principle admitted in it, *page 12*, from which flows this corollary, to wit: that the right of the State to the 500 horse power of water power was *for the use of the Penitentiary, and for that use only;* but from this principle there can be deduced no corollary which under the established and decided *facts* of the case can be of any aid to defendant's contention.

As to what is said in subdivision B of division 1 of defendant's argument, the Court is respectfully referred to plaintiff's Brief, pp. 12, 13.

N. B.—The land on which plaintiff's continuous and dangerous trespasses set out in paragraphs 12 and 13 of the complaint, *Record, pp. 9, 10*, threatening irremediable injury to and the safety of plaintiff's canal, were committed, is plaintiff's land, part of the western embankment of its canal, and land other than that land of plaintiff on which defendant erected its water plant, in accordance with the plans and specifications mentioned in paragraph 11 of the complaint.

LEROY F. YOUMANS,
For Plaintiff in Error.

AN ACT TO AUTHORIZE THE CITY OF COLUMBIA TO GUARANTEE AND PAY THE COUPONS ON BONDS TO BE ISSUED BY THE "BOARD OF TRUSTEES OF THE COLUMBIA CANAL," UNDER AN ACT ENTITLED "AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE CANAL, WITH THE LAND NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME."

SEC. 1.—Considerations. Election to be ordered.
SEC. 2.—Where and how held.
SEC. 3.—Result to be certified. The majority required.
SEC. 4.—Tax levies. Income of Canal to be paid to city.
SEC. 5.—Trustees of Canal to be elected.
SEC. 6.—Guarantee of the coupons by the city.
SEC. 7.—Registry of bonds. Payment of coupons.
SEC. 8.—Duration of Act. When to take effect.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That inasmuch as the completion of the Columbia Canal will secure to the city of Columbia the navigation of Congaree and Broad Rivers, give it greater facilities to increase her water supply, to establish electric lights, and for other municipal purposes, the Mayor and Aldermen of said city, upon the passage of an Act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to

the said Board the Canal, with the land now held therewith and its appurtenances, and to develop the same," shall order an election for the legal voters of the city of Columbia, to be held within two weeks after the approval of the said Act, or as soon thereafter as practicable, to determine whether or not the city of Columbia shall guarantee and pay the coupons on the bonds to be issued by the Board of Trustees of the Columbia Canal as they mature.

SEC. 2. That the said election shall be held in the different wards of the city, under the direction of the Mayor and Aldermen. Each vote deposited by legal voters of the city shall have written or printed thereon "Guarantee" or "No Guarantee."

SEC. 3. That the managers of the polls in each ward shall report to the City Council the number of legal votes cast for "Guarantee" and for "No Guarantee," and the majority of the votes cast will determine the question, and the Mayor and Aldermen shall declare the election: *Provided, however*, That it shall require a majority of all the qualified electors residing within the corporate limits of the said city of Columbia.

SEC. 4. That if the Mayor and Aldermen shall publish the election that a majority of the votes of the legal voters of Columbia which were cast at the election ordered by them was in favor of "Guarantee," then, at the same meeting of the City Council which publishes the election, or as soon thereafter as it is practicable, the Mayor and Aldermen shall be authorized and required to levy such a tax on the real and personal property assessed for taxation in the city of Columbia as may be necessary to pay the coupons, to be guaranteed by the city, maturing on the bonds to be issued by the "Board of Trustees of the Columbia Canal," for the year A. D. 1888, and shall annually thereafter levy a tax sufficient to pay the coupons as they mature on said bonds, and shall pay the same: *Provided*, That after the year 1893 the Board of Trustees of the Columbia Canal shall pay over semi-annually to the city of Columbia all the net increase derived from the sale, leasing or renting of water power, or such other sources, not exceeding in any one year the amount of the coupons maturing: *Provided, further*, That the amount of such levy, when added to the levy for the current expenses of the city and for the interest on the bonded debt of the city, shall not exceed two per cent. on the assessed value of the property in the city in any one year.

SEC. 5. That as soon after the publishing of the election of the legal voters that the majority of votes were cast for "Guarantee" as is practicable, the Mayor and Aldermen shall elect four members of the Trustees of the Columbia Canal, one from the Aldermen and three from the citizens at large.

SEC. 6. That the said Mayor and the City Clerk and Treasurer shall, as soon as practicable thereafter, sign the guarantee on the back of each bond of the following words: "The City of Columbia, South Carolina, guarantees the prompt payment of each and every

coupon attached to this bond," which may be presented to them for signature by the said "Board of Trustees of the Columbia Canal," and shall attest their signatures by the corporate seal of the City of Columbia, and as soon as signed and sealed to return the same to the said Board of Trustees of the Columbia Canal.

SEC. 7. That the Mayor and Aldermen shall keep a registry of all bonds which the Mayor and City Clerk and Treasurer have signed as guaranteeing the coupons, giving the number and denomination of bonds, and the number and amount of the coupons; that the said coupons, as they mature, shall be payable at the office of the City Clerk and Treasurer, in the city of Columbia, and shall be receivable for taxes due the city, except for water rents.

SEC. 8. That this Act shall be of force for thirty-one years, and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

W. L. MAULDIN,
President of the Senate.

JAMES SIMONS,
Speaker House of Representatives.

Approved December 24th, A. D. 1887.

J. P. RICHARDSON, Governor.

TITLE DEED TO THE CANAL.

THE STATE OF SOUTH CAROLINA.

Whereas, the General Assembly of the State of South Carolina, by an act entitled "An act to incorporate the board of trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same," approved December 24th, 1887, did, by the twenty-first section thereof, create the board of trustees of the Columbia Canal a body politic and corporate; and

Whereas, the said act did, by the first section thereof, provide: "That the board of directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the board of trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto, or otherwise, all and singular the rights, members, and appurtenances thereto belonging; and upon such transfer, assignment, and release, all the right, title, and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the

said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: *Provided*, That should the said canal not be completed to Gervais street within seven years from the passage of this act, all the rights, powers, and privileges guaranteed by this act shall cease, and the property shall revert to the State;" and

Whereas, the said board of directors of the South Carolina Penitentiary, by virtue of the power and authority conferred upon them, and in accordance with the terms and provisions of the said last mentioned section and act, did, by their deed bearing date the first day of February, 1889, recorded in the office of the register of mesne conveyance for Richland County, in the State aforesaid, in book "S" of deeds, page 262, transfer, assign, and release unto the said board of trustees of the Columbia Canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the Columbia Canal, and the lands held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, with all and singular the rights, members, and appurtenances thereto belonging, for the use and benefit of the city of Columbia, for the purpose set forth in said act, subject to the conditions, limitations, and provisos therein expressed and prescribed; and

Whereas, the said act did, by the ninth section thereof, authorize and provide that in order to secure the speedy development of the said canal, the board of trustees should have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent. per annum, to negotiate the same, and use the proceeds for the construction of said canal; and

Whereas, the said act did, by the tenth section thereof, authorize and provide that the said board of trustees shall have the power to mortgage the canal, with the land held therewith, and all its appurtenances, to secure the payment of the principal and interest of said bonds; and

Whereas, the General Assembly of the State of South Carolina, by an act entitled "An act to authorize the city of Columbia to guarantee and pay the coupons on bonds to be issued by the board of trustees of the Columbia Canal, under an act entitled 'An act to incorporate the board of trustees of the Columbia Canal, to transfer to said board the canal, with the lands now held therewith, and its appurtenances, and to develop the same,'" approved December 24, 1887, did authorize the mayor and aldermen of the city of Columbia to order an election to determine whether or not the city of Columbia should guarantee and pay the coupons on the bonds to be issued by the board of trustees of the Columbia Canal, as they mature; and

Whereas, in pursuance of the provisions of said last mentioned

act, the said mayor and aldermen of said city did order an election to determine whether or not the city of Columbia should guarantee and pay said coupons, and whereas said election resulted in favor of said proposed guarantee; and

Whereas, in pursuance of said act first above mentioned, the said board of trustees has executed and issued first mortgage bonds to the amount of $200,000, numbered from 1 to 300, inclusive, bearing interest at the rate of six per cent. per annum, and the said board, in order to secure the said bonds, has made, executed, and delivered a mortgage of the said canal, with the land held therewith, and all its appurtenances, which mortgage has been duly recorded in the office of the register of mesne conveyances for Richland County, in the State aforesaid, in book "Q" of mortgages of real estate, page 595, and in book "5" of mortgages of personal property, page 7; and in pursuance of said act last above mentioned, the mayor and city clerk and treasurer have affixed their signatures to the said guarantee of the city of Columbia; and

Whereas, the General Assembly of the State of South Carolina, by section 2 of an act entitled "An act to amend an act entitled 'An act to incorporate the board of trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same,'" approved December 24, 1890, did provide: "Section 2. That section 23 of said act be, and the same is hereby, amended, so as to read as follows: 'Section 23. That the said board of trustees, as soon as they have developed the said canal, and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said board of trustees shall have full power and authority, before the said canal has been fully developed and completed, and turned over to the city of Columbia, to sell, alienate, and transfer the same, and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said board of trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities, and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and before such sale, alienation, and transfer is made, thirty days notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia;" and

Whereas, George Wallace, on July 14th, 1891, made the following proposition to the board of trustees of the Columbia Canal and the mayor and aldermen of the city of Columbia for the purchase of the Columbia Canal: "I will pay for the canal completed to Gervais street, transferred to me under the authority of the act of the General Assembly of December 24, 1890, and subject to the conditions, duties, and liabilities thereby imposed, and by other acts of

the General Assembly relating thereto, excepting therefrom, for the use of the city of Columbia, a strip of land on the east and west side of the canal, from the north side of Laurel to the south side of Blanding streets, the two hundred thousand dollars of mortgage bonds on the canal when the same shall mature, and will guarantee to pay the interest on the said bonds as the same may fall due, in such manner as shall be satisfactory to the city council and it may approve of, when the canal completed to Gervais street shall be transferred and possession given, said payment and guarantee of interest to commence from the transfer and delivery of the possession of the canal, and sixty thousand dollars to be payable as follows: Fifteen thousand dollars cash upon the approval of the title to the canal by our attorney, and signing of the contract for sale, which shall be within seven days from the signification of the city council that they will accept this proposition; and fifteen thousand dollars within twenty days from the date of the signing of the contract; and thirty thousand dollars upon the completion of the canal to Gervais street, said completion to be approved of by Mr. Byron Holly, the engineer in charge of the work, and the delivery and transfer of the possession of the canal, which shall be not later than November 1, 1891. If, however, the canal is not completed to Gervais street and possession given by the first day of November, 1891, the board of trustees are to allow the undersigned interest at the rate of six per cent. per annum on the sums of money previously paid, until the canal is so completed and possession given. That the undersigned will allow free of charge, whenever the city should require it for its use, an additional one hundred horse power of water power to five hundred given by the act to the city of Columbia. The city of Columbia shall have the right to bridge the canal at its water works to reach the same, under the regulations prescribed by act of December 24, 1887;" and

Whereas, the said proposition was accepted by the board of trustees of the Columbia Canal, and upon being submitted to the city council of Columbia, the same was unanimously approved and consented to, at a meeting held on July 15, 1891, eleven members of the city council being present, and approving and consenting thereto; and

Whereas, the said agreement for the purchase of the Columbia Canal was, on the 4th day of August, 1891, duly assigned by George Wallace to Aretas Blood, and on the 24th day of September was duly assigned by said Aretas Blood to the Columbia Water Power Company, a corporation duly incorporated by and under the laws of the State of South Carolina; and

Whereas, under said agreement the board of trustees of the Columbia Canal and the city of Columbia have received the sum of $30,000, agreed to be paid by the purchasers of said canal within twenty days from the acceptance of the proposition to purchase; and

Whereas, the said George Wallace, in the contract of purchase

hereinabove set forth, did agree to guarantee to pay the interest on the said bonds as the same may fall due, in such manner as shall be satisfactory to the city council and it may approve of; and whereas, in pursuance of said agreement the said Columbia Water Power Company, the assignee of said contract, has entered into a written agreement under seal with the city council of the city of Columbia to pay the interest upon the said canal bonds as the same shall fall due, wherein the said Columbia Water Power Company has agreed to deposit certain bonds in the cities of New York and Columbia for the purpose of guaranteeing the payment of the interest on said bonds, and wherein the said Columbia Water Power Company has, among other things, agreed that on default of payment of interest as the same shall fall due, for six months, the bonds deposited in the cities of New York and Columbia shall become the property of the city of Columbia, and the trustees holding the same shall be authorized to deliver the same to the city of Columbia, and the said Columbia Water Power Company shall lose all interest under the aforesaid contract of George Wallace with the board of trustees of the Columbia Canal and the city of Columbia, and also all interest under such deed as shall be made to said Columbia Water Power Company, and the said property shall immediately vest in the city of Columbia, and the said Columbia Water Power Company shall thereupon execute title deed to the city of Columbia therefor; and wherein said Columbia Water Power Company has, among other things, also agreed that in case at any time the market value of the said bonds should depreciate to or below ninety-five cents on the dollar, or any of said bonds shall be hypothecated or sold, as in said agreement provided, the said Columbia Water Power Company shall, within thirty days after notice, make up such deficiency, whether the same be in amount or value, by deposit of sufficient bonds, selling not below par, and if such deficiency shall not be made up within six months from the date of such notice, then the same consequence to ensue as in case of default in payment of interest for six months; and

Whereas, the said Columbia Water Power Company has made such deposit, which said agreement and deposit have been accepted by the said city council of the city of Columbia as a satisfactory guarantee of the payment of said interest in pursuance of said contract, and the same has been duly approved by said city council; and

Whereas, the said canal has not been fully developed and completed throughout its entire length from its source at Bull's Sluice to the point where it empties into the Congaree River, and has not been turned over to the city of Columbia, but the same has been completed to Gervais street, as appears by the certificate of Byron Holly, chief engineer, of date December 11, 1891; and

Whereas, nine members of the city council of the city of Columbia approve and consent to the sale and transfer of the Columbia Canal, and the lands held therewith, and all the rights, easements,

privileges, appurtenances, and franchises conferred on the board of trustees of the Columbia Canal, and otherwise acquired, on the terms herein contained; and

Whereas, thirty days notice of the said sale, alienation, and transfer, and the terms thereof, has been given to the city council of the city of Columbia.

Now, therefore, know all men by these presents, that the said board of trustees of the Columbia Canal, a corporation duly incorporated as aforesaid under the laws of the State of South Carolina, in pursuance of the power vested in them by the General Assembly of the State of South Carolina, by section 23 of the act last above mentioned, as amended on December 24, 1890, and by and with the approval and consent of nine members of the city council of the city of Columbia, in consideration of the sum of $30,000 to them heretofore paid, within twenty days after the making of the contract of sale as aforesaid, and in the further consideration of the sum of $30,000 to them this day paid by the said Columbia Water Power Company, the receipt whereof is hereby acknowledged, and in consideration, also, of the payment by the said Columbia Water Power Company of the $200,000 of the said mortgage bonds on the canal when the same shall mature, and in consideration of the guarantee of payment of interest as aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Columbia Water Power Company, its successors and assigns, forever, all that property, situate, lying, and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal, and the lands held therewith, acquired under the acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights of way, rights of overflow, and appurtenances, acquired by the said board of trustees of the Columbia Canal in the development and improvement of the said canal or otherwise, whether the same be in Richland County or Lexington County, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining, and together with all the rights and franchises conferred by the acts of the General Assembly of the State of South Carolina on the said board of trustees of the Columbia Canal, excepting therefrom for the use of the city of Columbia a strip of land on the east and west side of the said canal from the north side of Laurel street to the south side of Blanding street,

To have and to hold, all and singular the premises before mentioned unto the said Columbia Water Power Company, their successors and assigns, forever, subject, nevertheless, to the conditions, limitations, provisos, and exceptions set forth and prescribed in the

acts of the General Assembly of the State of South Carolina hereinabove mentioned, and subject to the provisions of the proposition of George Wallace, of July 14th, 1891, hereinbefore contained; and subject also to the agreement of the Columbia Water Power Company, of date the day of , 1892, wherein the said Columbia Water Power Company did agree that on default of payment of interest on said canal bonds, as any of the same should fall due, for six months, said Columbia Water Power Company should lose all interest under the contract of George Wallace with the board of trustees of the Columbia Canal and the city of Columbia, also all interest under such deed as should be made to said company of the canal property, and that the said property should immediately vest in the city of Columbia, and that said company would thereupon execute a title deed to the city of Columbia therefor; and wherein, also, the said Columbia Water Power Company did also agree, in case at any time the market value of said bonds should depreciate to or below ninety-five cents on the dollar, or any of the said bonds should be hypothecated or sold, as provided in said agreement, that said company should within thirty days after notice make up such deficiency, whether the same be in amount or value, by deposit of sufficient bonds selling not below par; and that if such deficiency should not be made up within six months from the date of such notice, then the same consequence to ensue as in case of default in payment of interest for six months.

And the said board of trustees of the Columbia Canal do hereby bind themselves and their successors to warrant and forever defend all and singular the said premises unto the said Columbia Water Power Company, their successors and assigns, against ourselves and our successors, lawfully claiming or to claim the same or any part thereof.

In witness whereof, the said board of trustees of the Columbia Canal has caused its corporate seal to be affixed to these presents, and the members of said board of trustees of the Columbia Canal have hereunto subscribed their names, this 11th day of January, in the year of our Lord 1892, and in the 116th year of the sovereignty and independence of the United States of America.

F. W. McMASTER, [L. S.]
Chairman Board of Trustees of the Columbia Canal.
W. B. LOWRANCE,
Secretary and Treasurer.
W. B. LOWRANCE, [L. S.]
JOHN T. RHETT, [L. S.]
RICHARD S. DESPORTES, [L. S.]
F. W. McMASTER, [L. S.]
C. H. MANSON, [L. S.]

Signed, sealed, and delivered in the presence of
A. H. MONTEITH.
W. C. CATHCART.

SOUTH CAROLINA, }
Richland County. }

Personally appeared before me, A. H. Monteith, and made oath that he saw F. W. McMaster, chairman, and William B. Lowrance, secretary and treasurer, John T. Rhett, Richard S. Desportes, and C. H. Manson, members of the board of trustees of the Columbia Canal, sign the above written deed, and affix thereunto the corporate seal of said board, and, as their act and deed, deliver the above written deed for the uses and purposes therein mentioned; and that he, with W. C. Cathcart, witnessed the execution thereof.

A. H. MONTEITH.

Sworn to before me, this 20th day of January, A. D. 1892.
ALLEN J. GREEN, [L. S.] *Notary Public.*

THE STATE OF SOUTH CAROLINA.

Know all men by these presents: Thirty days notice of the offer to purchase the Columbia Canal, and the terms thereof, having been given to the council of the city of Columbia before the within sale, alienation, and transfer, we, members of the city council of the city of Columbia, in accordance with the provisions of the act of the General Assembly of the State of South Carolina, do hereby approve of and consent to said alienation, sale and transfer, and in testimony thereof have affixed hereunto our respective signatures, in the city of Columbia, this 20th day of January, in the year of our Lord 1892, and in the 116th year of the sovereignty and independence of the United States.

F. W. MCMASTER, *Mayor.*
G. V. ALLWORDEN, } *Aldermen*
W. MCB. SLOAN, } *from Ward 1.*
PHILIP MOTZ, } *Aldermen*
E. J. BRENNEN, } *from Ward 2.*
R. S. DESPORTES, }
W. C. FISHER, } *Aldermen*
C. C. HABENICHT, } *from Ward 3.*
JAS. M. SMITH, } *Aldermen*
JOS. H. GREEN, } *from Ward 4.*

Signed and delivered in the presence of
A. H. MONTEITH,
W. C. CATHCART.

SOUTH CAROLINA, }
Richland County. }

Personally appeared A. H. Monteith, who, being duly sworn, says he saw the above named F. W. McMaster, mayor, and G. V. Allworden, W. McB. Sloan, Philip Motz, E. J. Brennen, R. S. Desportes, W. C. Fisher, C. C. Habenicht, James M. Smith, and Jos. H. Green, nine of the aldermen, composing the city council of the

city of Columbia, sign and deliver the above written instrument, and that he, with W. C. Cathcart, witnessed the execution thereof.

A. H. MONTEITH.

Sworn to and subscribed before me, this 20th day of January, 1892. ALLEN J. GREEN, [L. S] *Not. Pub. S. C.*

The injury inflicted upon and threatening plaintiff, by the defendant's diversion of the 500 horse power of water power from the use of the penitentiary to the private gain and profit of defendant, is continuous, of the gravest nature, and as irremediable as the injury inflicted upon and threatening the safety of plaintiff's canal by defendant's excavation of the canal's embankment.

This takes place in this wise:

Among the objects of the completion of the canal was giving the city of Columbia greater facilities to increase her water supply, *to establish electric lights.* § *1, A. A. December 24, 1887, 19 St., 1097.*

The city of Columbia is the beneficiary of the conveyance of the canal to the Board of Trustees. § *1, A. A. December 24, 1887, 19 St., 1091; ante, page 31.*

The conveyance by the Board of Trustees of the canal to the plaintiff is redolent of advantages (outside of and in addition to the provisions of the A. A. 1887), exacted from plaintiff, by and for the city of Columbia.

In consequence of those advantages, the city of Columbia, for value, approved of and consented to this conveyance of the canal and all the rights and franchises conferred by the Acts of the General Assembly on the Board of Trustees, including the exclusive right and franchise "to sell and lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe."

Yet—despite all this, in consequence of its having granted certain privileges to defendant for the purpose of defendant's establishing, for defendant's private profit and gain, electric lights in the city, from the development of this 500 horse power of water power—the city of Columbia has refused permission and facilities to another electric company, which proposes to establish electric lights in the city, from development of water power, with which plaintiff has contracted to supply said other electric company from the water power of plaintiff's canal, independent and outside of this 500 horse power of water power.

Thus the plaintiff, in so far as this phase of the matter is concerned, is deprived not only of the monopoly of the right and franchise of which the Board of Trustees and the city of Columbia are the grantors and vendors for value, but of this right and franchise entirely—and the monopoly thereof is bestowed *ex gratia* upon the defendant.

LEROY F. YOUMANS,
For Plaintiff in Error.